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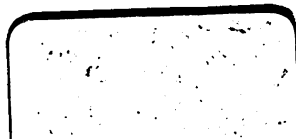




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REPORTS

OF

CASES IN LAW AND EQUITY

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF GEORGIA,

CONTAINING

Part of the Decisions at Atlanta, March Term ; Decisions at
Milledgeville and Athens, May Terms ; at Savannah,
June Term ; and part of the Decisions at
Macon, June Term, 1859.

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1859.



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JUDGES OF THE SUPREME COURT.

HON. JOSEPH H. LUMPKIN, Athens.

*HON. CHARLES J. McDONALD, Marietta.

HON. HENRY L. BENNING, Columbus.

HON. LINTON STEPHENS, Sparta.

B. Y. MARTIN, Reporter, Columbus.

ROBT. E. MARTIN, Clerk, Milledgeville.

JUDGES OF THE SUPERIOR COURTS.

PRESIDING DURING THE PERIOD OF THESE REPORTS.

Brunswick District,	Hon. A. E. COCHRAN, Brunswick.
Blue Ridge	" " GEO. D. RICE, Marietta.
Chattahoochee Dist.	" E. H. WORRILL, Talbotton.
Cherokee	" " L. W. CROOK, Summerville.
Coweta	" " O. A. BULL, LaGrange.
Eastern	" " W. B. FLEMING, Savannah.
Flint	" " E. G. CABANISS, Forsyth.
Macon	" " H. G. LAMAR, Macon.
Middle	" " W. W. HOLT, Augusta.
Northern	" " JAMES THOMAS, Beulah P. O.
Ocmulgee	" " R. V. HARDEMAN, Clinton.
Pataula	" " DAVID KIDDOD, Cuthbert.
Southern	" " PETER E. LOVE, Thomasville.
South Western	" " ALEX. A. ALLEN, Bainbridge.
Tallapoosa	" " D. F. HAMMOND, Newnan.
Western	" " N. L. HUTCHINS, Lawrenceville.

* Judge McDonald having resigned after the session of the Court at Milledgeville, May Term, 1859, the Executive filled the vacancy by the appointment of Linton Stephens, Esq., who took his seat on the Bench at Athens, May Term, 1859.

ERRATA.

Page 477, 14th line from the bottom, for "*to his parties,*" read "*toties quoties.*"

Page 348, 8th line from top, for "before," read "*upon.*"

Page 348, 16th line from top, for "Pherisfield," read "Brinsfield."

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CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT ATLANTA,
MARCH TERM, 1859.

Present—JOSEPH H. LUMPKIN,
CHARLES J. McDONALD, } Judges.
HENRY L. BENNING,

JOHNSON vs. ANDREWS.

An unsound negro was sold by an administrator, but without warranty of soundness, and without deceit. The purchaser applied for an injunction to prevent the collection of his note given for the purchase money. *Held*, That he was not entitled to the injunction.

In Equity, from Henry county. Decision by Judge CABANISS, at chambers, 30th April, 1858.

This bill was filed by the plaintiff in error to enjoin the collection of a note given by the plaintiff in error to defendant's administrators.

The bill alleges that said administrators sold a negro girl about thirteen years old, as the property of their intestate, at public outcry, and that complainant became the purchaser at and for the price of nine hundred dollars, for which he gave his note payable twelve months after date; that he took a bill of sale, but without warranty of soundness; and there is no allegation in the bill that the admin-

Johnson vs. Andrews.

istrators or heirs at law knew that said negro was diseased. But the bill alleges that at the time of said sale the negro had consumption and other diseases, of which she died in one month and twenty days from the day of the sale, and that she was utterly worthless, and that there was a total failure of the consideration of said note; that suit has been brought against him thereon by the administrators, and that he has pleaded the above facts to said action; that said note when collected will be assets in the hands of said administrators unadministered, or not yet paid over to the heirs at law; and that if compelled to pay the same, complainant will be well nigh ruined, as his means are limited and his whole estate does not much exceed in value the amount of said note. The heirs at law of deceased are made parties defendants with the administrators, and the prayer of the bill is for an injunction, &c.

The Chancellor refused to grant an injunction, and complainant's counsel excepted.

DOYAL & NOLAN, for plaintiff in error.

JNO. J. FLOYD, *contra*.

By the Court.—BENNING, J., delivering the opinion.

Was the court below right in refusing the injunction? We think so. There was no warranty of soundness—no deceit—and if the maxim of *caveat emptor*, ought not to apply in such a case, is there any case in which it ought to apply? We do not know of anything to prevent the maxim from applying in the case. All was fair; and when that is so, the sale ought to stand, unless there is a warranty and breach. It is to be presumed that both seller and buyer *act* upon the belief that the sale is to stand. Not to uphold it would, therefore, be really an interference with the contract of the parties, and with the contract as they themselves understood it.

Judgment affirmed.

SMITH vs. THE STATE.

1. An indictment for being the father of a bastard child contained no allegation that the woman was a *single* woman. *Held*, That the indictment was, nevertheless, good.
2. And further, that evidence that she was a single woman was admissible under the indictment.
3. A party being convicted of a misdemeanor, a motion was made by him for a new trial, and in that motion, was incorporated a brief of the evidence as taken down by the court; which brief was agreed to by both parties and approved by the court. The motion was overruled and the same brief was incorporated in a bill of exceptions, (which bill was also agreed to by the parties and sanctioned by the court,) and sent up to the appellate court. That court granted a new trial, and on that trial, a copy of this brief—the copy retained by the lower court, under the law on that subject—was offered as secondary evidence of what a witness had sworn to, on the first trial, a foundation having been laid for the introduction as secondary evidence. *Held*, That the copy was admissible.

Indictment for bastardy, from Henry county. Tried Before Judge CABANISS, at April Term, 1858.

Noah Smith, plaintiff in error, was indicted for bastardy.

Upon a former trial, had at April adjourned Term, 1857, he was found guilty, and upon a writ of error to the supreme court, that court reversed the judgment of the court below and ordered a new trial. (See 23d Geo. Rep. 297.) Upon the case coming on again for trial, the State proposed to prove that Seney F. Sears, the mother of the bastard child was a *single white woman*, and counsel for the defendant objected to this proof, on the ground that it was not alleged in the indictment that she was a single white woman. The court overruled the objection and admitted the evidence, and to this ruling defendant excepted.

After the State closed, counsel for defendant tendered in evidence for the purpose of impeaching the witnesses on

the part of the State, the *copy brief of the evidence*, taken on the former trial, containing the testimony of the same witnesses, and which copy was on file in the office of the clerk of the superior court. The *original* brief of this evidence had been transmitted as a part of the bill of exceptions to the supreme court, as required by law, when the case went up to that court, and the *copy* proposed to be read, was that required by law to be made and filed by the clerk in his office upon transmitting the original to the supreme court.

The State objected to the introduction of this testimony. The court sustained the objection and excluded the said copy brief, and defendant excepted.

The defendant having closed his testimony, the court, among other things, charged the jury "that in criminal cases the jury are the judges of the law and the facts—they are sworn to give a true verdict according to the evidence; and the evidence upon which they are to found their verdict, was that detailed from the stand by witnesses, and not from statements of counsel outside the evidence. It matters not what public opinion might be as to the guilt or innocence of the defendant, or what any one might think of his guilt or innocence. Such opinions should have no influence on their minds—they were under oath to give a true verdict according to evidence and not according to the opinions of others. And so jealous was the law of the rights of juries as the exclusive judges of the facts, that a statute had been enacted by the Legislature, prohibiting the judges of the superior court from intimating to the jury their opinion as to the facts proved; and if a judge of the superior court should so far forget his duty as to intimate to the jury his opinion as to what facts were proved or not proved, it would be error, and subject to correction. And in the case before them, they were to look to the evidence, and from it form their opinion. Whatever might be the opinion of the presiding

judge as to the facts, and whatever might be the opinion of the judges of the supreme court as to the facts, or the individual opinions of the judges of that court as to the facts, were all matters with which they, the jury, had nothing to do. They were under oath to render a true verdict according to the evidence and not according to the opinions of others."

To which charge counsel for the defendant excepted.

The jury found the defendant guilty.

Whereupon counsel moved in arrest of judgment on the ground that it was not alleged in the indictment that the mother of the bastard child was a *single white woman*. The motion was overruled and defendant excepted.

Defendant then moved for a new trial upon the ground of error in the rulings, decision and charge above excepted to, and on the further ground that the verdict was contrary to law and evidence—contrary to the weight of evidence, and contrary to the charge of the court.

The motion for a new trial was overruled, and defendant excepted.

DOYAL & NOLAN, and B. H. OVERBY, for plaintiff in error.

JOHN J. FLOYD, *contra*.

By the court.—BENNING, J., delivering the opinion.

Was the court below right in overruling the motion in arrest of judgment?

There was no allegation in the indictment that the woman was a *single white woman*. Was the want of that allegation a fatal defect in the indictment? We think not.

[1.] The first section of the fourteenth division of the Penal Code is in these words: "Every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct, which states the offence in the terms

and language of this Code, or so plainly that the nature of the offence may be easily understood by the jury." This indictment, we think, stated the nature of the offence so plainly, that it was easily to be understood by the jury.

Ought the court below to have granted the motion for a new trial?

The first ground of the motion was, that the court allowed the State to prove that the woman was a *single* white woman.

[2.] We have already held, that the indictment, although not containing an allegation that she was a *single* woman, was good. If the indictment was good, it must follow, that it was right to admit under it any legal evidence suited to establish the indictment. Evidence, that the woman was a single woman, was manifestly suited to do that. Then, for ought that we can see, it was admissible.

The second ground was, that the court excluded from the jury, the copy-brief of the evidence received on the former trial.

In support of the exclusion of this copy, it was argued, first, that it was but a copy.

That is true, but then the original was not accessible. That had been sent up to this court as a part of a case, (the previous case between these same parties,) and had become a paper of this court. There was, therefore, no way by which the State could get the paper itself back into the lower court. Consequently, the case became one for a resort to secondary evidence, and the copy retained in the lower court, was, as secondary evidence, equal to a copy from this court; seeing that it was a copy which the law required to be retained.

It was argued, secondly, that there was no authority for making the original—that the case was not a felony, and that the authority to take down the evidence is confined to cases of felony.

This is all true. There was no law authorizing the

judge to take down this evidence. But he did, in fact, take it down, and it, as taken down, was afterwards agreed upon as true by the parties, and approved as true by the court; and this, for two purposes: one, a motion for a new trial; the other a writ of error to this court; and there is law that does both authorize and require the evidence to be so agreed upon, or so approved for each of those purposes. The paper then became, in reference to these two purposes, an original paper, authorized and required by law.

It was argued, thirdly, that even conceding that there was authority of law for making the original, yet, that, as that was made, not for the purpose of being read in evidence before the jury, but for the mere purpose of being used before the lower court, on the motion for the new trial, or before this court on the writ of error, the original itself, would not, if present, have been admissible.

This argument, if good, would equally exclude from the jury, evidence taken down in case of felony—for even in such cases, the purpose of taking it down, is, probably, that it may be used in applications for pardon and respite; not that it may be used as even secondary evidence before the jury. But can it be true that the receivability of a party's admission, or of a court's judgment, depends on the purpose for which the admission was made, or the judgment rendered? It cannot, we think, unless there be something restricting the admission or the judgment to that special purpose. The test surely ought to be no more than this: is it probable that the admission admits only what is true—that the judgment sanctions only what is true. For the truth is all that justice requires. And taking this as the test, the paper in question, would, it is certain, be admissible. Is it likely that the parties agreed to anything as proved that was not proved, even though the only purpose of this agreement was to comply with the requisitions of the law as to new trials, and the law

as to writs of error? Is it likely that the court would have approved as true, anything that was not true, even though the purpose of the approval was merely to comply with the requisitions of these same laws? Certainly it is not. Surely all will agree that a paper thus agreed to by the parties, and approved by the court, will be more trustworthy on the question what was the evidence delivered on the trial, than the daily fading recollection of persons who happened to hear the evidence when it was so delivered.

We think, then, that this last argument is not any more than the first two, sufficient to show that this copy ought to have been excluded from the jury.

[3.] No other argument occurs to us as sufficient to justify its exclusion; consequently, we think the that exclusion of it was an error.

The third ground of the motion was the statement of the court to the jury, that whatever might be the opinion of the judges of this court on the evidence before the jury, that opinion was a matter with which they had nothing to do.

In respect to this ground it is sufficient to say, that the judges of this court did not, as a court, express any opinion at all on the evidence in the case. If they had, it would be a grave question, whether it would be true that that opinion would be a matter with which the new jury would have "nothing to do." This court abstained from passing any judgment on the ground that the verdict was contrary to the evidence.

The last ground in the present motion was, that the verdict was contrary to the evidence.

We again abstain from rendering any judgment on this ground. The exclusion of the copy-brief of the evidence makes it necessary that there should be a new trial, and a new trial is all that the plaintiff in error asks for, or is entitled to. An opinion of this court on the evidence is,

for obvious reasons, generally withheld, if it can be withheld.

Judgment reversed.

WHITLOCK vs. GAINS.

When the verdict is equitable and there is evidence to support it, it will not be set aside, for an error in the charge, unless there is a motion for a new trial with that error as a ground of the motion.

Complaint from DeKalb county. Tried before Judge BULL, at October Term, 1858.

Thomas O. Gains brought suit in the form of complaint, under the act of 1847, against Charles Whitlock, on an account as follows:

Charles Whitlock,

To Thomas O. Gains,

Dr.

1856.

To personal service and labor.....\$110 00

“ six months board at \$8 00 per month..... 48 00

\$158 00

Plaintiff introduced as a witness Seaborn Cochran, who testified that he was present and heard the contract between plaintiff and defendant. Gains was to work twelve months for defendant for one hundred and ten dollars, and make up all lost time, and Whitlock was to furnish Gains with tobacco. Gains commenced work in January, 1856, and quit in July following—did not know why he quit.

Levi Chewing testified that he saw plaintiff at work

for defendant from January until July—his services were worth ten dollars per month—Whitlock requested plaintiff to quit sometime in April or May.

Defendant proved by B. F. Shumate, that in July he heard defendant request plaintiff not to leave and insisted on his remaining and going to work. Plaintiff said he would go, and did leave in a few days. This was in July—don't know why plaintiff quit.

Defendant also offered and read in evidence a note which he held on plaintiff for \$16 50, which he had pleaded as a set-off.

The court charged the jury that when parties make a contract they are bound by it. That in this case, if the contract was that Gains was to work twelve months, and left of his own accord before the time expired, without Whitlock's consent, he could not recover. If Whitlock turned him off, then he could recover the whole amount agreed to be paid; or if the parties mutually agree to abandon the contract, then plaintiff could recover for the time he worked, and the law presumed that the parties mutually agreed to abandon the contract, in the absence of proof to the contrary.

To which charge counsel for defendant excepted.

The jury found for the plaintiff forty-one dollars and thirty-nine cents, and counsel for defendant assigns as error the charge above excepted.

THOS. J. W. HILL, for plaintiff in error.

DIAMOND, *contra*.

By the Court.—BENNING, J., delivering the opinion.

The part of the charge excepted to was this: "And the law presumed that the parties mutually agreed to abandon the contract, in the absence of proof to the contrary."

We are not prepared to affirm this part of the charge,

but, nevertheless, we think it not a sufficient matter to require the granting of a new trial. There was sufficient evidence to support the verdict; and the verdict was equitable. One man ought not to enjoy another man's services without paying something for them.

There was no motion for a new trial, consequently, we are not under the constraint of the new trial act of 1854.

Judgment affirmed.

COHEN vs. MANCO.

The plaintiff in attachment ought to sign his affidavit, and if he does not, the defect is not amendable.

Attachment from Whitfield county. Decision by Judge TRIPPE, at October Term, 1858.

John L. Cohen sued out an attachment against Martin Mance, an absent debtor. At the term of the superior court to which the attachment was returnable, counsel for defenant moved to dismiss the case, on the ground that there was no affidavit as required by law.

The paper or writing purporting to be the affidavit made by plaintiff, prior to suing out the attachment, was not signed or subscribed by him, but was as follows:

State of Georgia, } J. L. Cohen comes before the
Whitfield County. } undersigned, and on oath says that
Martin Manco is indebted to him, the deponent, in the
sum of one hundred and thirteen dollars and forty cents,
due on settlement of account; and that said Martin Manco
resides out of this State.

Sworn to before me this tenth day of August, 1858.

W. H. STANSELL, J. P.

The court granted the motion, dismissing the attachment on the ground therein stated, and holding further that the affidavit was not amendable. To which decision plaintiff excepted.

STANSSELL represented by Walker, for plaintiff in error.

JOHNSON & JACKSON, *contra*.

By the Court.—BENNING, J., delivering the opinion.

Was the court right in holding, first, that the affidavit ought to have been signed by the plaintiff; secondly, that the defect of a want of his signature was not amendable? We think it was.

The attachment act says, that “before process of attachment shall issue, the party shall make affidavit,” &c. Acts of 1856, 25. An affidavit is an oath in writing, signed by the party making it. What is not so signed, is not entitled to be called an affidavit.

Then, the act gives the form of the “affidavit,” and in that form a place seems left for the signature of the plaintiff.—*Ib.* 35.

The old attachment act merely used the word oath and yet the construction of it was, that the oath must be one in writing, signed by the party taking it.

We think, then, that the affidavit ought to have been signed by the plaintiff.

The act, in the provision it makes for amendments, mentions, expressly, the attachment, the bond and the declaration, but is silent as to the affidavit. This, we think, significant of an intention, that the affidavit was to be not amendable.

So we think that the court was right on both questions.

Judgment affirmed.

SULLIVAN, CABOT & CO. vs. ROME R. R. CO.

When a motion for a non-suit is made in the circuit court and refused, and the decision is excepted to and reversed in the supreme court, it is competent for the plaintiff to amend his writ, so as to make it correspond with his proof, at the time when application is made, upon the return of the *remittitur* to enter the judgment of the court upon the minutes of the circuit court.

Case, from Floyd county. Decision by Judge HAMMOND, at August Term, 1858.

Upon a motion made that the judgment of the supreme court be entered on the minutes of the superior court and be made the judgment of that court, counsel for plaintiffs moved to amend their declaration; said amendment charging defendant with unreasonable delay in delivering the cotton at Kingston and Augusta, and alleging that defendant undertook and contracted to deliver the cotton in a reasonable time at Kingston and Augusta. (See 25 Geo. Reports, 228.)

The court refused to allow the amendment, and counsel for plaintiffs excepted.

J. W. H. UNDERWOOD, for plaintiffs in error.

PRINTUP, and SHROPSHIRE, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

When this case was first tried in the circuit court, the defendant, that is, the Rome Railroad Company, moved for a non-suit. The application was refused—the defendant excepted and brought his writ of error to this court. (25 Geo. Rep. 228.) We reversed the judgment of the

Cunningham vs. Rice.

court below; and when the *remittitur* was sent back, a motion was made by the defendant to enter the judgment of reversal on the minutes of the court.

Cotemporaneously with this motion the plaintiff asked leave to amend his declaration, so as to make it correspond with his proof. This was denied, and Sullivan, Cabot & Co. excepted.

We think the amendment should have been allowed. Suppose the circuit judge, in the first instance, should have granted the non-suit, would it not have been competent for the plaintiff to have amended his writ so as to make it conform to the case as proven by the testimony? Most assuredly the judgment of reversal by this court could not do more than this. It does not terminate a case *proprio vigore*, but our judgments have to be carried into effect by the circuit court. Here, then, is a *stage of the proceeding* at which it is the right of the party under the statute, to amend his pleadings. And the law is good. It saves delay and cost—two of the greatest evils attendant on the administration of justice.

Judgment reversed.

CUNNINGHAM vs. RICE.

The doctrines of *Mygatt* and others vs. *Goetchius*, (20 Geo. Rep. 350,) reviewed and re-affirmed.

In Equity, in Floyd superior court. Decision by Judge HAMMOND, at chambers, Dec. 9, 1858.

The defendant in error, John H. Rice, filed this bill to

enjoin plaintiff in error, C. T. Cunningham, from erecting a steam flouring mill in the city of Rome.

The allegations of the bill were, that complainant's residence was about 300 feet from the site of the proposed mill—a street intervening—that said mill would be a nuisance to complainant—the smoke, sparks and soot therefrom would greatly disturb and annoy himself and family, and seriously diminish the value of his property.

The bill was sworn to and supported by the affidavit of a number of respectable and intelligent citizens of the city of Rome.

The Chancellor granted the injunction.

Defendant filed his answer admitting the facts as to his intention to build said mill, and the situation of the premises as stated in complainant's bill, but denying that said mill would be any nuisance or injury to him or his property, and that his fears and apprehensions in relation to the injury and annoyance from the sparks, smoke, noise and soot, were imaginary and fanciful—that defendant's own residence was nearer the site of the proposed mill than complainant's; and that if he thought or believed that it would do complainant any injury he would not build it.

Defendant, in support of his answer, had the certificate of a number of respectable citizens of Rome, to the effect that in their opinion the proposed mills would not injure complainant's property; and that the annoyances contemplated from the erection of said mills, would not, in their judgment, be experienced by him. Upon the filing of his answer, defendant moved to dissolve the injunction. The court overruled the motion and held up the injunction and defendant excepted.

UNDERWOOD & SMITH, for plaintiff in error.

T. W. ALEXANDER, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

In *Mygatt et al. vs. Goetchius*, (20 Geo. Rep. 850,) this court held that when taking the bill and answer, the structure complained of will not *prima facie*, constitute a nuisance—the injunction will not be continued; but that the party will proceed at his peril—the whole subject being under the control of the jury at the hearing.

We re-affirm the doctrines of that case, and agree that it fully covers and controls this. Indeed, this is a much weaker case than that.

Judgment reversed.

MITCHELL vs. COX.

If H. dies in Arkansas and there is a creditor of the deceased in Georgia, and assets belonging to the estate here, and the estate of H. be insolvent, the creditor in this State is entitled to receive his *pro rata* share of the entire fund in both States; and neither justice nor the courtesy of States requires that the surplus be transmitted by the ancillary administrator here to the principal administrator in Arkansas.

In Equity, from Floyd superior court. Tried before Judge HAMMOND, at February Term, 1859.

This was a bill filed by John Cox against Daniel R. Mitchell, and its allegations, in substance, are:

That one White E. Harden, formerly of Floyd county, Georgia, was indebted to complainant by note and account—some two or three hundred dollars, and being so indebted he removed to the State of Arkansas, where he died intes-

tate, and probably insolvent, some time in the year 1857. That letters of administration on Harden's estate have been taken out in Arkansas, and the administrator has refused to pay complainant's demands. That Daniel R. Mitchell, of the county of Floyd, has in his hands money or effects belonging to said Harden of the value or amount of over four hundred dollars; that no administration has been taken out in Georgia, and that complainant knows of no other fund or property out of which to obtain satisfaction and payment of his demands, except those in the hands of Mitchell; and that Mitchell has been paying off some of the debts against the estate of said Harden; and that complainant has applied to Mitchell for payment of his claims, which Mitchell refused to pay.

The prayer of the bill is that Mitchell may answer and set forth what funds or effects he has in hand belonging to Harden, the deceased; what debts of said Harden he has paid, and when and to whom; and that he be enjoined from paying over any money or effects in his hands belonging to said deceased, to any person; but that he be decreed to hold the same, subject to the further order of the court.

There was an amendment to the bill praying that summons of garnishment be issued requiring one Alfred Buffington, (the debtor of Harden, and whose note was in Mitchell's hands for collection,) to answer on oath what he was indebted to said deceased, or what effects he had in hand belonging to him.

Defendant demurred to this bill. He also filed a plea, averring that at the time of Harden's death, he, deceased, was a citizen of Arkansas; that he died in October, 1857; and that administration on his estate has been granted there to one John Hardcastle. That defendant is a practicing attorney at law, and in the latter part of 1858, said administrator placed in his hands for collection a note on one Alfred Buffington, for four hundred and

seven dollars, payable to the said Harden. That in pursuance of instructions from said administrator, he had a settlement with Buffington, who had counter demands against deceased; and upon said settlement, made 13th July, 1858, and before said bill was filed, Buffington paid to defendant the balance found due after deducting his claims, and this is the fund, and only fund, in defendant's hands belonging to said deceased, &c.

The case coming on to be heard upon the demurrer and plea, the presiding judge overruled the same, and ordered defendant to answer. To which decision counsel for defendant excepted.

UNDERWOOD & SMITH, for plaintiff in error.

D. S. PRINTUP, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

Whether Mitchell holds the note of Buffington, belonging to the estate of White E. Harden, or the proceeds which stand in the place of it, makes no difference. In the settlement of the note he was justifiable in allowing as a set-off, or part payment, the counter claims held by Buffington against Harden. He could not have compelled payment of Buffington, except for the excess. But as to the surplus, if there be any, the courtesy between States does not, we apprehend, extend so far as to require this fund to be transmitted to the State of Arkansas, and force the creditor in this State to go there to collect his debt. On the contrary, we rather think that the fund should be impounded here, until Cox can receive, at least, his *pro rata* share of the entire assets of the deceased, provided the estate is insolvent. If the estate be solvent, then, there need be no controversy; but the whole amount of the money here should go to the creditor here. All that justice demands is, that when an estimate is made of the

whole estate of Harden—if the part coming to the claim of Cox would be less than the fund in Georgia—in that event, for the overplus to be sent by the ancillary administrator here, to the principal administrator in Arkansas. We are not prepared to say that even this is not going too far.

We see no reason for reversing the circuit judge.

Judgment affirmed.

MONCAS vs. STACKS & LEDBETTER.

A, as principal, and B as security, make a note to C. B takes up the note and endorses it in the second instance to D. A is sued to insolvency by D—making no defence. An action will lie against B at the instance of D, to recover upon the endorsement.

Assumpsit, in Paulding superior court. Decision, on demurrer, by Judge HAMMOND, October Term, 1858.

This was an action of assumpsit by John K. Moncas, for the use of another, against John Stacks and John Ledbetter, to recover the sum of \$819 00, besides interest on several promissory and sealed notets.

The declaration alleged that these notes were originally made to Henry Peck or bearer, and signed by one Eli C. Reeves and said Stacks, but that Stacks was only security, and that he paid off said notes as security and took up and acquired possession of the same, and afterwards, for a valuable consideration, said Stacks and Ledbetter as his security, endorsed said notes to plaintiff. And the declaration further alleged that if said notes were paid off by Reeves or Stacks at the time they were endorsed

and delivered to plaintiff, said payment was well known to said Stacks and Ledbetter, and that they are therefore liable thereupon. The declaration further alleges that plaintiff sued Reeves to insolvency on said notes in the State of North Carolina, and that the same are wholly unpaid by said Reeves or any other person.

Defendants demurred to the declaration. The court sustained the demurrer, and dismissed the action and plaintiff excepted.

It was agreed by counsel in the case that the pleas of the statute of limitations, and of notice from Stacks as security, to plaintiff to sue Reeves, the principal, which he failed to do within three months, were filed.

BUCHANAN, BROYLES and ALEXANDER, for plaintiff in error.

CHISOLM, and FIELDER, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

It seems that Eli C. Reeves as principal, and John Stacks as security, made and delivered to one Henry Peck, divers promissory notes and bonds. That subsequently, Stacks took up these papers, and together with one John Ledbetter, endorsed them for a valuable consideration to John K. Moncas, to be liable in the second instance. That Reeves, the maker, has been sued to insolvency, and this action is brought to recover the amount of said notes and bonds from Stacks and Ledbetter. The defendants on the trial demurred to the declaration and insisted that as these notes and bonds had been taken up by Stacks, they could not be again put into circulation by him. After argument the court non-suited the plaintiff, who excepted, and now complains of said ruling as error.

In the judgment of this court a non-suit should not

have been awarded in this case. It is distinguishable from the case of Micklebury and Mobley against Shannon, administrator, (25 Geo. Rep. 237.) In that case, Blakely, the apparent principal, never was liable upon the note. The consideration for which it was given had entirely failed. It was for the hire of a negro, which was never delivered. May, the security of Blakely, having by some means possessed himself of the note, re-issued it. This, we held, he could not do. May could not, by his own act, change the original contract and convert Blakely without his consent, into a security for him.

But in this case, Eli C. Reeves was primarily liable, and he has never discharged this debt.

So, too, it differs from the case of Beck against Robley, cited in 25th Georgia, from Henry Blackstone's reports. To have sanctioned the re-issue of the draft, there would have changed the relation and character of the parties to the contract as well as their relative liabilities.

Here, as already stated, Reeves was the person first bound—Stocks was his security only—Stocks took up the notes and bonds, and endorsed them to the plaintiff. Reeves has been sued to insolvency and made no defence, and suit is now brought against Stocks and Ledbetter, charging them with the payment of these claims in the terms of their contract. Are they not estopped from setting up the plea that the negotiability of these papers, destroyed by being taken up by Stocks, who, as security, was not only authorized but bound to take them up?

It is not a strained position to assume that from the facts of this case it may legally be inferred that Reeves agreed with Stocks, that the notes and bonds sued on, when taken up by him, should not be treated as *functus*, but that they might be re-issued, with a view to the re-imbursement of his security. Reeves has abided by his undertaking. He has been sued as *maker* upon these papers, and not con-

troverted the title of Moncas, as derived through the endorsement of Stocks.

Why should Stocks be permitted to deny the validity and vitality of the instruments sued on ?

Judgment reversed.

EDMONDS' EX'RS vs. GOODWYN AND GOODWYN.

Notwithstanding fraud and concealment is a good reply to the plea of the statute of limitations, still, where the demand is thirty years old, and the creditor has been grossly negligent in not ferreting out the fraud, equity will not lend its aid in such a case.

Equity, in Coweta superior court. Decision on demurrer, by Judge HAMMOND, at September Term, 1858.

This was a bill filed by plaintiffs in error as executors of the last will and testament of Thos. Edmonds, deceased, late of Dinwiddie county in the State of Virginia, against the defendants in error, of the county of Coweta, in the State of Georgia, seeking to enforce and recover satisfaction of certain judgments obtained in the State of Virginia against Burwell Goodwyn, the defendants' testator.

The bill alleges that these judgments were recovered 7th April, 1830; and that said Burwell Goodwyn, to injure and defraud complainants, and defeat the payment and collection of said judgments, caused his property, or certain portions thereof, to be sold at public sale by the sheriff of Dinwiddie county, in the State of Virginia, and bought in clandestinely and fraudulently, by one Oliver, with said Burwell's own money, and for the benefit of

said Burwell and family ; and after said sale the property returned to, and remained in possession of his family, and was nominally held and claimed by Mrs. Elizabeth Goodwyn, the mother of said Burwell. That more successfully to carry out this fraudulent scheme, the said Elizabeth pretended to execute her last will and testament, bequeathing said property, consisting of slaves, to Napoleon B. Goodwyn, a son of Burwell and grand-son of said Elizabeth, but that the said Burwell continued in possession of said negroes until his death in the year —. That after his death the said negro slaves went into the possession of Nancy Goodwyn, his widow ; and she, with Napoleon B. Goodwyn, her son, has held said slaves ever since, and still holds them, without administration on said Burwell's estate ; such failure to administer being a part of the plan to conceal and consummate the said fraud, and to hold out to the world that said Burwell owned no property at the time of his death. That afterwards, the said Nancy Goodwyn with her family, including Napoleon, removed from the State of Virginia, to Coweta county, in the State of Georgia, and brought with them the said slaves. That matters thus stood when Napoleon B. came of age, and he brought suit against his mother, the said Nancy, for these slaves, which suit is still pending, and who is defending said action upon the ground of the statute of limitations, and that said sheriff's sale and will of Elizabeth Goodwyn were all a pretext and arrangement to secure said negroes to Burwell Goodwyn and his family, and to protect the same from his creditors. That such was the condition of things until the spring of 1857, when Napoleon returned to Virginia with a view of looking up evidence to support his suit for said negroes, then pending against his mother ; when meeting with complainants he informed them of the aforesaid facts, which was the first time they had ever discovered said fraud.

The prayer of the bill is, that defendants be decreed to

pay and satisfy the judgments aforesaid, out of the negroes in their possession, belonging to the estate of said Burwell Goodwyn, deceased, and which were thus sold, held and remained as aforesaid, for the purpose of defrauding complainants and defeating their judgment claims.

Defendants filed a demurrer to this bill, and for cause of demurrer alleged :

1. That there is no equity in said bill.
2. That the complainants have an adequate and full remedy at law.
3. That complainants' cause of action as set out in their said bill, is stale and barred by lapse of time.
4. That the cause of action did not accrue within five years before the filing of said bill.
5. That the judgments which are sought to be recovered are the judgments of another State, and have not been obtained within five years next before the commencement of this suit, and are consequently barred by the statute of limitations.

After argument the court sustained the demurrer, and dismissed complainants' bill, and counsel excepted.

B. H. HILL, for plaintiff in error.

FREEMAN, and SIMMS, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

This is an attempt to enforce a foreign judgment, thirty years old, against certain persons in this State. To the plea of the statute of limitations, the complainant replies that while it is true that he had a cause of action upon his judgment against the estate of Burwell Goodwyn, the debtor, that he had none which he could enforce against the defendants, until the fraudulent concealment of certain property by them, belonging to Burwell Goodwyn,

was recently discovered. Let this pass for as much as it is worth. We rather think it was a sufficient reply to the plea.

Burwell Goodwyn resided in the State of Virginia when this property was sold by the sheriff as his property. There the creditor has lived. The property, when sold, went immediately back into the possession of Burwell Goodwyn, the defendant in execution, and remained there as long as he lived, and has been in the possession of his family ever since. Here was a badge of fraud, open and notorious, which should have put the creditor upon inquiry whether the pretended sale was not a sham ; and whether the money of Burwell Goodwyn, and not of Mrs. Elizabeth Goodwyn, his mother, did not go to pay for the property.

While, then, we admit that the fraud, until discovered, will prevent the statutory bar from attaching, yet there must be reasonable diligence on the part the creditor to detect the fraud. That, we think, is wanting in this case ; and that the want of it is fatal to the complainants' right to recover, if there was no other reason.

Judgment reversed.

JONES vs. SMITH.

A trial in the justice court took place on the 27th day of November, 1857, and the party cast filed his petition for *certiorari*, on the 28th of May, 1858. *Held*, That the *certiorari* was not applied for within six months "from and after the trial," as required by the law.

Certiorari, in Floyd superior court. Decision by Judge HAMMOND, February Term, 1859.

William R. Smith sued Dudley S. Jones in a justice court on a promissory note, for forty-one dollars and ninety-one cents, dated 18th January, 1850, payable one day after date. Defendant plead payment and set-off, and offered in evidence a receipt from plaintiff for an order on one Eddleman, for a note on F. C. Brannan, for fifty dollars; also for a receipt of fifty-one dollars and seventy cents worth of medicine, on L. W. Hicks & Co.; specifying that said note and medicine were to be held by Smith as collateral security, and applied to the note sued on.

The proof was that Smith received the medicines from Hicks & Co., but that they were unsaleable, and only about three dollars worth had been sold. The jury, in the justice court upon this testimony, found for the defendant eight dollars and fifty-six cents. And Smith sued out *certiorari*, to have the verdict set aside, and for a new trial.

At the hearing in the superior court, counsel for Jones moved to dismiss the *certiorari*, on the ground that application therefor was not made within the period allowed and provided by law, and that he had no notice of the same. The trial in the justice court was 27th November, 1857; the petition and affidavit for *certiorari* was filed in the clerk's office 28th May, 1858, and the *certiorari* issued 31st of same month. The court overruled the motion to dismiss, and sustained the *certiorari*, and ruled a new trial in the justice court, and counsel for Jones excepted.

R. D. HARVEY, for plaintiff in error.

FOUCHE, and PRINTUP, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

We hold that the court was clearly wrong in deciding that the *certiorari* was applied for within six months "from

and after the trial," as the party is bound by law to do. (Cobb, 528.)

The trial took place on the 27th of November, 1857; and the petition for *certiorari* was filed the 28th of May, 1858. Count the six months as beginning to run the day after the trial, namely, the 28th of November, and the six months would be out at the end of the 27th of May. You cannot, of course, count the 28th of November and the 28th of May; but must include one and exclude the other. But a proper construction of the act would require the count to begin on the 27th of November. "From and after," are the words of the statute.

As to the enumeration of the days of the several months, that is never done, when the count is by months.

Judgment reversed.

SMITH vs. GEORGE.

Where A and B have been working for C under the employment of D, and distrusting the ability of D to pay them, refuse to go on; and to induce them to do so, C agrees to pay them himself, or see them paid; this promise may include what is due for past as well as future services.

In order to bind a contract made with a minor, it is not necessary that their parent be present. It is enough if the father or mother subsequently ratify the agreement.

Complaint, in Floyd superior court. Tried before Judge HAMMOND, February Term, 1859.

This was an action brought by Mrs. Sarah George, against William R. Smith, to recover two hundred and sixteen dollars for the work and labor of her two sons,

Jarrett and Joshua, alleged to have been done and bestowed in and about the erection of a bridge. The demand was in the form of an account, as follows :

Wm. R. Smith,

To Sarah George,

Dr.

1852.

To work and labor done by son Jarrett from

1st April to 25th Dec., at \$12 per month, \$108 00

To work and labor done by son Joshua, from

1st April to 25th Dec., at \$12 per month, \$108 00

\$216 00

Plea, the general issue.

It appeared that one Brown contracted to build a bridge for defendant across the Etowah river. That he undertook the job at a stipulated price; employed laborers and workmen, and amongst others Jarrett and Joshua George, minor sons of plaintiff. There was testimony that the hands, or some of them, doubting Brown's ability to pay them, made complaint and were about to quit the work, when defendant made some promise that if they would work on he would pay them, or see them paid. The evidence was somewhat conflicting on this point. Plaintiff proved that her boys worked at the bridge about five months, and that the services of one was worth about \$10 per month, the other about \$8.

The defendant requested the court to charge the jury that he could not be liable for more than the work done by the boys *after* his promise to pay. The court charged that this was so, unless defendant agreed and promised at the time to pay for the whole work, as well that done before as after the promise, in which event he would be bound for the whole. To which charge, as given, counsel for defendant excepted.

Defendant also requested the court to charge, "that to entitle plaintiff to recover, they must believe the boys

went to work originally under the contract with Brown, and the plaintiff afterwards became dissatisfied, and refused to permit them to work longer, unless defendant would agree to pay for their work, and that it was in consequence of that promise that they continued to work; and this promise must have been made, or made known to plaintiff, and she acted on the faith of it in permitting her boys to remain." This charge the court refused to give, and defendant excepted.

The jury found for the plaintiff one hundred dollars, and defendant moved for a new trial on the ground of error in the charges above excepted to, and upon the additional ground of newly discovered evidence. The court refused the motion and defendant excepted.

T. W. ALEXANDER, for plaintiff in error.

SHROPSHIRE, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

We affirm the judgment of the court below on all the grounds taken in the bill of exceptions. The judge charged the law correctly, and as favorable to the defendant as he was entitled to.

Why should these boys go unpaid? Ought not Mr. Smith to pay somebody for the work and labor which they did for him, and that, too, at his own special request?

As to the newly discovered testimony, the showing is not sufficient to let it in; and if it were submitted to a jury, it could not change the result.

The fact that their mother said she wished them to work with Mr. Brown to learn their trade, is not inconsistent with the idea that they should be paid for their services by Mr. Smith.

Judgment affirmed.

MAYOR AND COUNCIL OF ROME vs. OMBERG.

The corporation of the City of Rome, in grading a street, dug so near the lot of the plaintiff, that the earth which supported it crumbled away and the fence fell. *Held*, That no action could be maintained against the Mayor and Council for this injury.

Case in Floyd superior court. Tried before Judge HAMMOND, February Term, 1859.

This was an action on the case brought by defendant in error against plaintiff in error, for digging and cutting down the street adjoining his lot, whereby his fence, erected upon the line of said street, had been undermined and thrown down. Damages laid at five hundred dollars.

The defendant pleaded the general issue and statute of limitations.

The plaintiff proved the cutting and excavation of the street by the City Council; and that it would cost about one hundred and twenty-five dollars to build a stone wall sufficient to prevent the wasting and crumbling away of the bank, and to secure the fence from being undermined.

Plaintiff having closed, counsel for defendant moved to dismiss the suit, on the ground that the defendant, being a municipal corporation, was not liable in this form of action.

The motion to dismiss was overruled, and defendant excepted.

Defendant then proved that the Presbyterian Church commenced the excavation on this street in 1849; that they were notified by defendant to stop, which they did, but not until they had excavated one-third the length of plaintiff's lot. This left the street in an impassable condition, and in 1851, the grading and excavation was continued, in order to render the street passable—worked at

this excavation again in 1854, but at this time did nothing more than was necessary to put that street in good order, as would have been done on any other street in like condition.

The court charged the jury, "that if the injury complained of had occurred within four years from the commencement of the action, and they should believe that it resulted from the act of the defendant, then the plaintiff was entitled to recover whatever damages he had proved; and in making up their verdict, they must calculate, not from the time the excavation was made, but from the period the injury occurred, in order to determine the question of the statute of limitations."

The jury found for the plaintiff one hundred and twenty-five dollars, and defendant excepted, and assigned for error:

1st. The decision of the court overruling defendant's motion to dismiss the case.

2nd. The charge aforesaid of the court.

3rd. That the verdict was contrary to law and the evidence, and the damages excessive.

T. W. ALEXANDER, for plaintiff in error.

UNDERWOOD & SMITH, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

The question involved in this case is one of great practical importance, and I confess my convictions are not so strong as I could wish them to be.

It is not denied that the Mayor and Council had authority to grade the streets of the city of Rome. There is no excess of authority charged. In the exercise of this acknowledged right, is the city which they represent to be assessed with damages for digging so near defendant's lot that the earth which supported, afterwards crumbled away and his fence fell?

It cannot, we think, with any propriety be contended that this is taking private property for public use. They were simply using their own property for the purpose for which it was appropriated, by reason of which this consequential damage resulted to the plaintiff.

This question has been mooted both in England and in this country, and there are strong precedents in both against the claim here set up. (See 24 Geo. Rep. 402, and the authority there cited.)

In Governor & Co., Cast Plate Manufacturers, vs. Meredith, (4 Durn. and East. 794,) a case, which in principle, is like the one now under consideration, it was said by Lord Kenyon—"If this action could be maintained, every turnpike act, paving act and navigation act, would give rise to an infinity of actions. If the Legislature think it necessary, as they do in many cases, they enable the commissioners to award satisfaction to individuals who happen to suffer. But if there be no such power the parties are without remedy, provided the commissioners do not exceed their jurisdiction. The interests of individuals must give way to the accommodation of the public." (See also Sutton against Clarke, 6 Taunton 29; Hall against Smith, 2 Brigham 156; Leader vs. Maxon, 3 Wilson 471; 2 Henry Blackstone's Rep. 924, S. C.)

The same principle was elaborately argued and carefully considered in Wilson vs. the Mayor, &c., of New York. (1 Denio's Rep. 595,) and the supreme court held, upon a review of all the cases, that the corporation of the city of New York was not liable to actions for injuries done to individuals, in the exercise of its authority to direct the *ditching*, *paving* and *grading* of the streets; and that when the corporation, in grading two public streets, which formed an angle in which the plaintiff's premises were situated, raised those streets so as to prevent the water from flowing off, whereby damages ensued to the plaintiff, who brought case against the corporation, that

the action could not be sustained, (See 22 Wendell 653 ; Law of Easements, page 156, note 17, and page 181, King vs. Coma.)

It being conceded that these proceedings are regular ; that what has been done, it was lawful to do ; the corporation not having transcended its authority, our conclusion is, that although the plaintiff has been injured, it is *damnum absque injuria*. People purchase property and build in towns with full knowledge of public necessity to level streets by excavating or elevating, as the case may demand ; and they must take the chances and consequences. No part of the plaintiff's land has been touched. Why should the corporation be required to furnish a prop from their street to keep up the plaintiff's enclosure ? Has he the right to take the public highway for that purpose ? Is it not more reasonable for him to furnish the stone wall than for the corporation to erect it ? They do not need it. He does. He has used his property with an eye single to his interest and convenience ; why should not the public be suffered to do the same with theirs ? Why did he erect his fence so near the street as to make this support necessary ? The public necessities compel the opening of streets of a certain width. But there is no such imperative necessity for the plaintiff's having his yard or garden a few feet wider. There is more of selfishness at the bottom of all these claims than appears at first blush.

Judgment reversed.

MAYOR AND COUNCIL OF ROME vs. CABOT.

Under a power conferred by the Legislature upon a municipal corporation, to make all contracts in their corporate capacity, which they may deem necessary for the welfare of the city, and which do not conflict with the constitution and laws of the Federal or State governments, they have the right to make a contract for the construction of water-works.

In Equity, from Floyd county. Decision by Judge HAMMOND, at chambers.

This was a bill filed by F. M. Cabot, John H. Towers, and Cunningham M. Pennington, for and in behalf of themselves, and others, citizens of the city of Rome, and owners of real estate and tax-payers in said city, against the Mayor and Council of the said city, and Noble, Brothers & Co., to enjoin and restrain said Mayor and Council from consummating a contract with said Noble, Brothers & Co., for the erection of water-works in the said city; or if said contract has been made, then, to annul and rescind the same, and to enjoin said Mayor and Council from issuing the bonds of said city for and in payment of said water-works.

The bill states that said city is situated in the fork of two large rivers, and is well supplied with water, and that there is no necessity for the erection of said water-works; and charges that said Council have let out said contract and are erecting said water-works, from sinister and corrupt motives, one of their number being the contractor for the construction of said works. That it will involve a heavy outlay and devolve upon said city a heavy debt, to be paid by taxes to be imposed upon the property of complainants; and that said Mayor and Council have no authority under the charter of said city, and the laws

of the State, to incur said indebtedness, or to impose the taxes necessary to its payment.

The injunction was granted agreeably to the prayer of the bill.

Defendants, the Mayor and Council of the city of Rome, answered the bill, denying any improper, corrupt or fraudulent purpose in the effort to construct said water-works. That the question was submitted to a vote of the citizens and tax-payers of said city, and a majority were in favor of having said works constructed. That there is a great necessity for the erection of water-works in said city. They submit the question of their power and authority to the judgment of the court, and move that the injunction be dissolved, on the grounds,

1st. Because there is no equity in complainants' bill, and said injunction should never have been granted.

2d. Because, if there was any equity in said bill, the same has been fully denied and sworn off by the answer.

The Chancellor overruled the motion to dissolve the injunction, and defendants excepted.

D. S. PRINTUP, and T. W. ALEXANDER, for plaintiff in error.

SHROPSHIRE, and UNDERWOOD, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

Ought the injunction in this case to have been dissolved?

The answer fully denies all the special equity set up in the bill, and the only question left to be decided is—did the Mayor and Council have authority to make the contract to construct water-works for the benefit of the city? We do not doubt it.

By the §13 of the charter, the Mayor and members of the Council, have special power to make all contracts in their corporate capacity which they may deem necessary.

 Simpler vs. Lord.

for the welfare of the city, which do not conflict with the constitution and laws of Georgia and the United States, "reference to which alone shall be had in the adjudications to be made upon this act,"—"and to levy a tax for the fulfillment of the same." Surely this grant is broad enough to cover this contract.

It is not shown or pretended, that a contract to construct water-works, so necessary to the health and security of the city, contravenes, either the constitution of the State, or of the Federal Government, or the laws thereof.

Judgment reversed.

 SIMPLER vs. LORD.

Where the testatrix is aged and infirm in body and mind, and her will is impeached on account of the fraud of her son and principal legatee in its procurement, he ought to produce clear and satisfactory proof of the *bona fides* of his conduct in the matter.

Caveat to will, from Meriwether county. Tried before Judge BULL, at August Term, 1858.

A paper, purporting to be the last will and testament of Elany Simpler, deceased, was propounded for probate before the Ordinary of Meriwether county, by William Simpler, the executor therein named.

William Lord and others, heirs at law of deceased, filed their caveat to said paper writing, propounded as the last will and testament of deceased, upon the following grounds:

1st. Because deceased, at the time of making said pre-

tended will, was not of sound disposing mind and memory, and had not legal capacity to make a will.

2d. Because said pretended will was procured by fraud and undue influence on the part of William Simpler, the principal legatee in and under said will, and the executor thereof.

3rd. Because deceased was prevented by fraud and undue influence from destroying and cancelling said will; and by fraud and deception practiced upon her, by said William Simpler and others, induced to believe that said will was and had been destroyed in her life-time.

The Ordinary, pronounced in favor of the will, and ordered and adjudged that the same be admitted to record and probate; from which decision caveator appealed.

On the trial, upon the appeal, the following testimony was submitted, viz:

Evidence for Propounder.

Aaron Sibly—proved that he was one of the subscribing witnesses—saw deceased sign the same, and the other witnesses—does not think she was of sound mind—she was quite old and feeble—some seventy or eighty years of age—has known her for several years—the will was executed at the house of deceased, and at the time it bears date.

Cross-Examined.—William Simpler came for witness to go and attest the will. Witness was unwilling to go—Simpler urged him to go—proposed to pay him if he would go—said he was going to get the advantage in the will, and wanted it executed then. A day or two before this, Simpler asked him, witness, to write a will for his mother, she not being present, which witness declined to do, for the reason that he did not think she was capable of making a will. Simpler then asked witness if he had a form book—told him he had and furnished him with one, from which he drew up a will for his mother. [Wit-

ness was here handed a paper, and he was asked if that was the paper which propounder drew up as his mother's will from the book.] Witness said this was the paper—that it was in propounder's hand writing, and was brought by him to his mother, where the will was executed—the will signed by deceased was copied from the paper written by propounder, with some slight alterations in the names of some of the legatees and small legacies, upon witness suggestion that all the legatees must be named or the will would not be good. The recollection of witness is, that the paper drawn by propounder was read over, but it was not the one signed by deceased. Dr. Fambrough wrote the will and copied it substantially from the paper furnished by propounder. The will was handed to witness to keep, after it was executed. Propounder was managing his mother's affairs as her guardian at the time—has heard him say that she did not have capacity to manage her own affairs. About twelve months after the will was executed, Valentine Simpler, (a son of deceased,) called upon witness one Sunday, on his return from church, and said his mother had sent him for her will, which witness declined giving to him—told him that it was not a proper day to attend to such business. Shortly after this he saw propounder and told him that the old lady had sent for her will—propounder told witness that if she sent for it again, to send her the paper from which the will was copied, (already identified.) After folding it in an envelope, and sealing it up, and requesting witness to endorse on it, "Mrs. Elany Simpler's 2nd last Will and Testament"—this paper was left with witness, with directions to be sent to his mother. In a short time, Mrs. Simpler sent to witness again for her will, and he sent her the paper enveloped and endorsed as above. She never sent afterwards for the will—it was taken out of his hands by propounder and placed in the hands of Dr. Fambrough, as he has been informed. Witness is a justice of the

peace—had no other motive in sending the copy will than to comply with the request of the propounder, who was a neighbor. Has said, and so thinks, that Valentine, although called an idiot, has as much sense as many of the other children.

Isaac C. Bell—was present when the will was executed—signed it as a subscribing witness, and saw deceased sign it. She did so freely and voluntarily—thinks she was of sound disposing mind—has known her several years—thinks she had a strong mind for a woman of her age. Says positively, that there was no paper there from which the will was copied, brought by Simpler or any other person—the will was dictated by the old lady herself, and was written by Dr. Fambrough, and read over to her after it was written.

Cross-Examined.—Says positively, there was no paper there at the time the will was written from which it was copied. In April, 1857, deceased told witness that she had no will, and requested him to write to L. M. Adams, Esquire, to come and write her a will. Witness wrote to Adams. At this time witness did not consider the old lady in her proper mind, and not capable of making a will. She requested witness to convey a message to the church, requesting its prayers in her behalf, which he did—conversed with her freely at the time—thought her rational—thinks the last conversation was subsequent to the date of the note he wrote to Adams. Dr. Fambrough is witness' son-in-law. William Simpler came after witness to witness the will. Witness suggested to the old lady that she ought to give her daughter Beersheba something, which she did.

John S. Rayland, a subscribing witness, swears that he thought deceased was of sound mind at the time—has known her several years—saw no paper from which the will was copied—they were writing the will when witness got there—stayed in the house but a short time. William

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Simpler came after him, and has heard him say that his mother had not capacity to manage her own affairs.

Wm. A. Fambrough testified that he was a subscribing witness—was sent for, and signed the will at the request of deceased—thought she was of sound and disposing mind and memory at the time she executed it—thinks she signed it voluntarily and freely. She charged witness to keep the whole matter secret—her reasons were that if the other children found out that she had made a will, they would trouble her as they once before did. Witness wrote the will—when he got there she or they had a will, or copy of a will that did not suit her fully, and she said she would rather have another written, and the company, or witnesses, requested witness to write it for her. Witness conversed with her during the time—considered her mind strong for a woman of her age.

Cross-Examined.—William Simpler notified him that his mother wanted to make her will, and requested witness to go to her house—the will was executed at her house. He wrote the will and used a paper furnished by some one, (but don't know by whom,) for a form; thinks the paper shown to him was very near like it—don't know that it is—had no papers before him except the one referred to—don't know whose hand-writing it was—thinks it likely that it was in propounders hand-writing, but cannot say positively. Witness' impression is, that William Simpler said he had written it or had it prepared. Will not say that William Simpler handed him the paper from which he copied the will. The will was given to Esquire Sibby, after it was executed, to keep—William Simpler was present—they did not live together.

The paper then propounded was offered and read in evidence—it bears date, 14th May, 1855.

Evidence for Caveators.

Nancy F. Crosson, testified that she has often heard Mrs.

Simpler say that she was in trouble about her affairs—that her great trouble was, that she wanted a will so a to leave her poor idiot children something, and not suffer for want of attention. The last time she recollects was in the spring of 1857. Mrs. Simpler said if she should die and not leave a will, her son William would cheat them out of all that they had, and they would come to want, for Nancy would not live three weeks after she was gone. She stated that she wanted Ann Ellis to take care of Nancy, and for her to have Noah and Mary, and Valentine to have John and the place where she lived. She said that William Simpler and wife should not have the care of her poor idiot children, for she would not let d,; be in their care, much less her children. Mrs. Simplers' mind was as good as it had been for some years past. She had no confidence in her son William, for he would say one thing and do another. Witness said that William appeared to be friendly, but Mrs. Simpler had no confidence in him, and did not think so.

Cross-Examined.—She had a number of conversations with Mrs. Simpler in the years 1856 and 1857. Witness is, and always has been, friendly with William Simpler and his wife—is not a relation of deceased—visited her as a neighbor—knows nothing about the quarrel of Valentine and William Simpler.

Jane H. Howard, says, in substance, that she has heard Mrs. Simpler say that she wanted a will—cannot say how often, but many times. In the spring of 1856, she first began to talk about her will, so on to 1857, and appeared to be very much troubled about it, and all, or most of her trouble was about her two idiot children, and she had no friend in the world to help her—she said if she could have one friend she would be glad—that Isaac C. Bell had promised to send to Esquire Adams and have a will written for her—had never done so—she believed he had joined William Simpler against her—said she had no will

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and wanted Ann Ellis to have Nancy and take care of her, and she wanted Nancy to have Noah and Mary, and Valentine to have the place and John—this was in the spring of 1857—as for William Simpler and wife, they would be too fine to take care of my poor children—they should not take care of a dog of hers, much less her poor idiot children—that William's wife called her a lunatic—said she told her she would have sense enough not to let her have all—that she should not have all her property, or what she had worked for—said she had no confidence in her son William—that he was doing all he could against her.

Cross-Examined.—Cannot say how many times, nor how often she has had conversations with Mrs. Simpler—has always been friendly with William Simpler and his wife—supposed at the time Mrs. Simpler had no will, for she stated so to witness—never tried to get her to make a will in favor of witness—is not a relative—went to see her as a neighbor.

Seth Williams has known Mrs. Simpler for a number of years—lived neighbor to her. Sometimes she would appear rational, and at other times she would not have any sense at all—has heard William Simpler say she was entirely incapable of managing her own affairs—visited the old lady frequently, and regrets to say that William Simpler neglected his mother—did not give her the attention she needed—she complained that he did not furnish her enough to eat, &c. William Simpler's wife was generally there, but he was not. Some years ago when the old lady's health was good, he witnessed a will for her, in which she disposed of her property nearly equal among all her children, except Valentine and Nancy—thinks she gave them somewhat the most and left their share in the care of William Simpler.

Mr. Howard says, that in the spring of 1857, deceased requested him to write a letter to her daughter, Ann

Ellis, who lived in Alabama, to come in and see her, as she was very much troubled about her property, and wanted to make some disposition of it—complained of William's treatment towards her—said she had lost all confidence in him, and requested witness to write to Ann Ellis, not to direct her letter to her, if she did William Simpler or William Lord would get it out of the post-office and she would never get it; to direct her letter to the witness—wrote the letter as requested and sent it by mail.

T. B. Godfrey says that he was well acquainted with deceased—has known her for several years—lived neighbor to her—does not think she has been capable of making a will for the last ten years—was very old, infirm and deranged—has heard William Simpler say she was entirely incapable of managing her own affairs, and that he was managing them for her, as her guardian.

Dr. Chatfield, for propounder, testified that in the spring of 1855, he and Dr. Reese were requested by William Simpler to walk up to Mr. Grant's law office, in Greenville, and examine the condition of his mother's mind in relation to some proceedings in court to restore to his mother her property, as he stated. Witness examined her and thought her mind sound at that time; as much so as most people of her age and feeble condition. Does not recollect whether this was before or after the date of the will.

The jury found the paper propounded to be no will.

Propounder moved for a new trial on the following grounds:

1st. That the verdict was contrary to evidence and the weight of evidence.

2nd. That the verdict was contrary to law.

3rd. That the verdict is contrary to both law and evidence.

The court overruled the motion for a new trial and propounder excepted.

B. H. HILL, and ADAMS & KNIGHT, for plaintiff in error.

HIRAM WARNER, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

The caveat to the will of Mrs. Simpler is put upon two grounds, to-wit: incapacity to make a will, and fraud on the part of William Simpler, her son and principal legatee in the procurement of it.

The jury pronounced against the will. The circuit judge refused to grant a new trial; and the court is called on to reverse the judgment, notwithstanding it is conceded that the facts of the case were fairly submitted, under the law, to the jury.

To justify us in overruling the judgment, the case should be a strong one.

Upon the question of insanity, we might admit, perhaps, that the preponderance of proof is against the verdict. There is very stubborn testimony, however, in support of it. It is disputed and doubtful, whether the will was read over to the testatrix at the time of its execution. And that it was written from any instructions by her, there is no pretence whatever, although it may be in conformity to her long cherished intentions.

As to the second ground of caveat, the fraud of William Simpler in procuring the will, the weight of evidence is in favor of, and not against the verdict; and instead of producing the most satisfactory proof as to the *bona fides* of his conduct, as he was bound to do, considering the condition of his mother, and the large interest he took under the will, there is the utter absence of explanatory testimony to remove the cloud which overhangs this transaction. There is much of art and contrivance disclosed

in the record ; and no one can doubt but that the old lady died, believing that she had no will, and who but her son, was the author and contriver of this mistake and delusion ?

Judgment affirmed.

MADDOX vs. ROWE.

Notwithstanding the original bill be sworn to, yet the amendment to it need not be, unless it be necessary to continue the injunction.

A father and son agree that the son shall convey to the father a certain lot of land, in consideration of which the father undertakes and promises to devise to the son two other lots, and also property to compensate him for services rendered. A bill to enforce this agreement is not demurrable for multifariousness.

In Equity, in Troup superior court. Decision by Judge BULL, November Term, 1858.

The facts of this case will be found fully reported in 23rd Geo. Rep.

The principal object in this bill was to set up and enforce an agreement, made between complainant and his father, in relation to two lots of land, which, for a valuable consideration received, his father had agreed to devise to complainant in and by his last will and testament, and which he failed to perform, on account of a defective execution of his will, the same not being attested by three credible witnesses, there being only two witnesses to the same. There was a demurrer to the bill which was overruled ; to which decision defendants excepted, and the

case coming up before the supreme court, the judgment of the court below was affirmed. (See 23rd Geo. Rep.)

At the subsequent trial in the court below, plaintiff having filed an amendment to his bill, counsel for defendants moved to strike said amendment from the files. The court refused the motion and defendant excepted.

Counsel for defendants then demurred to the bill as amended, on the ground of multifariousness.

The court overruled the demurrer and defendant excepted.

The following is the amendment allowed:

"The complainant amends his bill by leave of the court, first had and obtained as follows: And your orator expressly states that the property conveyed in said will to your orator, was bequeathed under an express and distinct contract; that in consideration that your orator would live with his father, as alleged, and attend to his business, and execute the deed aforesaid, he would make said will and bequeath his property as specified in the exhibit to this bill; and your orator fully and faithfully performed his part of said contract, and the said deceased performed in good faith his part, except that he failed to have three or more credible witnesses to his will. Your orator further sheweth, that the court of ordinary of Harris county, has appointed one James H. Rowe the administrator of said Shadrach Rowe, Sr., deceased, and the application to propound said paper as a will has been withdrawn under the decision of the court. Prayer, that the administrator be made a party defendant, and that said paper writing may be set up by a decree of the court as a contract, and the estate of Shadrach Rowe, Sr., deceased, be distributed as directed by its provisions.

J. N. RAMSARY, for plaintiffs in error.

B. H. HILL, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

This case has been before this court before. (23 Geo. Rep. 431.) It was verbally agreed between Shadrach Rowe, Jr., and Shadrach Rowe, Sr., that son should convey to the father a certain lot of land; and that in consideration thereof, the father should devise to the son two other lots. All of which was done. But the father's will having been attested but by two witnesses, could not be executed.

The court held that the son was entitled to a specific performance of the contract from the representatives of the father.

It was further stipulated between the father and son, that the father should make provision by his will for his son, by way of compensation, for some nineteen years of service rendered by the son in superintending his father's business. And this, too, was done. But the will, as to the personalty, proved to be likewise void for want of proper attestation; and the son proposes now to amend his bill for specific performance, so as to include the personalty as well as the realty; and to make the representatives of the father parties as well as the heirs at law. This the court allowed to be done, and the decision is excepted to; upon what ground we are not informed.

As the original bill was a sworn bill, praying an injunction, the objections to the amendment may have been because it was not verified. And if the amendment were needed to continue the injunction, such objection would have been good. But it was not needed for that purpose. The injunction has served its purpose, and it is not desired on the part of the complainant to retain it. The administrator of S. Rowe, Sr., will distribute the estate of his intestate at his personal peril, after having been made a party to this proceeding; and the injunction was granted originally to prevent this.

Another question is made in the bill of exceptions, but not insisted upon. After the amendment was filed, the whole bill was demurred to for multifariousness. The facts raise no such difficulty. The case made by the original and amended bill are perfectly harmonious; and are so joined together that they could not well be put asunder.

Judgment affirmed.

COUCH vs. THE STATE.

To entitle a defendant, indicted for an offence of a grade, for which, under the statute, he has the right to demand a trial, to an order of discharge and acquittal, he must show by the minutes of the court, that he has made such demand, according to the Act.

Indictment, from Cass county. Decision by Judge TRIPPE, at September Term, 1858.

Jesse Couch, the plaintiff in error, was indicted for keeping open a tippling house on the Sabbath day. At the term of the court next after that at which the indictment was found, and before the juries were discharged, the defendant moved to place his demand for trial on the minutes of the court. This motion was made before the case was reached or called in its order for trial, and was refused by the court.

At the succeeding term, (September, 1858,) defendant appearing and demanding a trial, there being a jury impannelled and qualified to try said cause, moved to be discharged and acquitted of the offence charged in the

indictment. This motion the court overruled, and counsel for defendant excepted.

W. T. WOFFORD, for plaintiff in error.

Sol. Gen. JOHNSON, *contra*.

By the Court.—McDONALD, J., delivering the opinion.

The plaintiff in error did not except to the decision made by the court refusing to allow his demand of a trial to be placed on the minutes, at the term of the court at which the demand was first made, but he excepted to the decision of the court at a subsequent term refusing an order of acquittal and discharge from the offence for which he was indicted. On this last decision error is assigned. It was the right of the defendant to demand a trial at the term of the court at which he applied to make the demand, and to have it entered on the minutes of the court; and it was the duty of the presiding judge to allow the demand to be placed on the minutes of the court. It was no reason to refuse it, that the cause was not called in its order. The object of the act is to insure to defendants a speedy trial, and nothing can defeat their right, except the want of a jury qualified to try the cause. Defendants are entitled to the precedence over all other causes for trial, provided they make the demand legally. But when they apply for an order for their discharge and acquittal of the offence, they must shew from the minutes of the court, that they had demanded a trial at a previous term of the court. In this case the plaintiff in error shewed no demand by the minutes. He did not except to the decision of the court when that demand was refused him. So far as this case is concerned, it is the same as if no effort of the sort had been made. Had a demand of trial been established by competent proof, the plaintiff in error

Holcombe vs. the State.

would have been entitled to a trial at that term of the court, or to an order of acquittal of the offence, provided a jury was impannelled qualified to try the cause. His acquiescence in the decision of the court first made, precluded him from availing himself of the act at the next succeeding term under which he claimed a trial, or acquittal and discharge.

Judgment affirmed.

HOLCOMBE vs. THE STATE.

1. A witness may testify that he wrote a letter addressed to a particular individual ; but he will not be permitted to disclose the contents, unless the foundation is first laid to let in this secondary evidence.
2. When the case is not only fairly but favorably submitted to the jury, and there is sufficient proof to sustain the verdict, the court will reluctantly interpose, especially where there is reason to believe that the jury understand the character of the witnesses, and of the accused, better than the court.

Indictment, for forgery, in Fayette superior court.
Tried before Judge BULL, September Term, 1858.

The plaintiff in error was indicted and found guilty of forgery. He moved for a new trial on the following grounds :

1st. Because the verdict was contrary to evidence.

2nd. Because the verdict was contrary to law.

3rd. Because the verdict was contrary to the charge of the court, in this, that the court charged, that the presumption of guilt arising from the possession, by defendant, of the alleged forged deed at any particular time,

might be rebutted by shewing that another person had possession of the same deed at some prior period.

4th. Because the court refused to permit defendant's counsel to ask a witness on the part of the State, if he did not write a letter to J. J. Whitaker, to claim for him the lot mentioned in the deed, but only allowed counsel to ask him if he had written a letter.

The court refused the motion for a new trial, and defendant excepted.

J. M. & W. L. CALHOUN, and WHITAKER & BATES, for plaintiff in error.

Sol. Gen. T. L. COOPER, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

There are but two exceptions in this case; one the refusal of the judge to permit Holliday to testify as to the contents of the letter he wrote to Judge Whitaker, and the other that the verdict was contrary to the evidence and the charge of the court.

1. As to the first, we see nothing to vary this case from the ordinary rule of evidence, that while it was allowable for the witness to state the fact that he had written a letter, yet he could not go further and testify as to the contents, unless the foundation was first laid to let in this secondary proof.

2. It is possible that the weight of evidence is against the verdict, still there is proof sufficient to justify it. Jeremiah Walker, the ostensible grantor, swears that the deed is a forgery; and Holliday states positively, that the deed, with other title papers to the land in dispute, in Pike county, was transmitted to him through the mail by the defendant, who had previously promised to furnish him with these conveyances; and that he would send

them in this way. The case was not only fairly but favorably submitted to the jury by the judge; and they, in the exercise of their rightful prerogative, have seen fit to believe Holliday, rather than Isaac Holcombe, the son of the accused.

We apprehend the jury understood this case, and the witnesses, as well as the party implicated—better than we do.

Judgment affirmed,

WALLACE & WINGFIELD vs. HULL, FRIERSON & CO.

1. A partnership is presumed to be solvent until the contrary appears.
2. The apparent interest of each partner is to be considered and treated as his actual interest, until rebutted by proof.
3. The right of partners can be ascertained and settled at law as well as in equity.
4. A creditor of two members of a firm is entitled, by garnishment, against any one having effects of the firm in his hands, or who is a debtor to such partnership, to subject the interest of said two members in said effects or debt to the payment of his demand.

Attachment and Garnishment, from Fulton county.
Decided by Judge BULL, at October Term, 1858.

Hull, Frierson & Co., sued out an attachment in Muscogee county, against Thomas M. Caldwell and James F. Cummings, partners in trade, resident in the State of Tennessee, under the firm and name of *Caldwell & Cummings*, for the recovery of a debt amounting to four hundred and thirty dollars. Garnishment was served upon Wallace & Wingfield, commission merchants of the city of Atlanta,

Fulton county, who answered that at the time of service they had in their hands about one thousand dollars worth of bacon, which they had since sold and converted into money, belonging to Thomas M. Caldwell, James F. Cummings and John C. Caldwell, junior, partners in trade, resident in the State of Tennessee, under the style and firm of *Caldwell, Cummings & Co.*, but they had nothing belonging to Caldwell and Cummings, the defendants in the attachment.

The plaintiffs traversed the answer of the garnishees, and the issue upon the traverse was submitted to a jury.

It was in proof upon the trial, that the plaintiffs had recovered judgment in the attachment for \$430 00, besides interest and cost. It was further proved that Thomas M. Caldwell and James F. Cummings, under the style of Caldwell & Cummings, did business in Shelbyville, Tennessee, for a number of years, down to 1st January, 1856, when said firm was succeeded by the house of Caldwell, Cummings & Co., composed of the said Thomas M. Caldwell, James F. Cummings and John C. Caldwell, junior; and that the bacon in question was consigned to the garnishees by said Caldwell, Cummings & Co. for sale.

Upon the close of the testimony, counsel for the garnishees moved to dismiss the garnishment, on the ground that the effects in their hands belonged to the firm of Caldwell, Cummings & Co., and could not be attached for a debt due by Caldwell & Cummings. The court overruled the motion, and charged the jury that they should find for the plaintiffs *two-thirds* of the amount admitted by the garnishees in their hands belonging to Caldwell, Cummings & Co., provided plaintiffs' demand amounted to that much; if not, then the amount of their demand. To which ruling and charge garnishees excepted.

The jury found for the plaintiffs, against the garnishees, four hundred and thirty dollars principal, besides interest and cost.

Whereupon counsel for garnishees tender their bill of exceptions, assigning as error the decision and charge above excepted to.

Judge Benning being related to one of the parties, did not preside in this case.

GLENN & COOPER, for plaintiffs in error.

J. M. & W. L. CALHOUN, and B. Y. MARTIN, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

We cannot concur with that class of authorities which hold that such a proceeding as this cannot be maintained at law. If the firm of Caldwell, Cummings & Co., be solvent, and the interest of Caldwell and Cummings in that concern could be ascertained, there could be no difficulty in this case. Is it not safe to assume, and the country and the courts act upon this assumption, that a firm is solvent until the contrary appears? and that the apparent interest of each person is to be considered and treated as his actual interest, until rebutted by proof?

It has been settled in this State that, were this a common law execution, it could have been levied on the bacon in the hands of the garnishees; or if sold by them, the proceeds could be reached by process of garnishment, based upon the common law judgment. Can any sensible distinction be drawn between the two cases?

It has been held in England that the rights of the partners can be ascertained and settled at law, as well as in equity; and notwithstanding the doubts of Lord Eldon, and the difficulties which occurred to Lord Alvanley, the doctrine laid down by Lord Hardwicke, has not been overruled; namely: that a settlement could be made at law.

Let the partner then of Caldwell and Cummings appear

and contest the interest of Caldwell and Cummings in this fund; or show that the firm is insolvent, and that he is intitled to retain and dispose of these effects for the partnership debts—not those which might thereafter have been contracted, but such as were due when this process was served.

Judgment affirmed.

EVANS vs. LIPSCOMB *et al.*

Where a suit is pending against a *feme sole*, and she intermarries, the suit does not abate, neither can the husband be made a party by *scire facias*, but the case proceeds to judgment and execution without noticing the husband.

Debt, from Troup county. Decision by Judge BULL, at November Term, 1858.

This was an action of debt, by the ordinary, for the use of certain heirs at law, against Harriet Lipscomb, administratrix of Mildred Bowling, deceased, and her securities on the administration bond.

Pending the suit, the administratrix intermarried with Archibald G. Stanford, and *scire facias* issued and was served upon him to show cause why he should not be made a party defendant in said cause, &c.

Stanford, by his counsel, answered and showed for cause, that he was not liable to be made a party defendant to the suit pending against his wife as administratrix, at the time that he married her.

After argument, the court held the showing good, and

dismissed the *scire facias*. To which decision plaintiff excepted, and assigns the same as error.

B. H. BIGHAM, and N. M. HARRIS, for plaintiff in error.

B. H. HILL, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

The only question in this case is this: If an action be pending against a single woman, and she marry, can a husband be made a party by *scire facias*?

Our brother Bull decided that he could not; and he had the authority of this court for so holding.

Mr. Chitty says, "if she," (a feme sole,) "marry, pending an action against her, it will not abate, but the plaintiff may proceed to execution without noticing the husband." 1 Chitty's Pleadings, 48; 5th Amer. Ed., and citing 2 Strange 811; 4 East. 521; Cro. Jac. 523, Bacon Title Abatement G. Loft. 27; 2 Ld. Raymond, 1525. Our judiciary act of 1799, (Cobb 472,) provides that where a feme sole, "*being plaintiff*," shall marry, pending any suit, the same shall not abate by said intermarriage, but the same being suggested on record, such cause shall proceed in the name of the husband and wife.

It would be well for the Legislature to extend the provisions of the act to the case of feme sole defendants, and authorize the husbands to be made parties, not summarily upon motion, but by *scire facias*.

Judgment affirmed.

HOLSENBACK vs. MARTIN.

When an appeal is dismissed on account of a defect in the affidavit upon which it is entered, it is the privilege of the plaintiff to move to re-instate the case by amending the affidavit at any time within the term, it not appearing that any injury resulted by reason of granting such permission.

Case, and appeal in Forma Pauperis, from Fayette county. Tried before Judge BULL, at September Term, 1858.

This was an action on the case by Henry Holsenback against William Martin, for criminal conversation with plaintiff's wife.

Plaintiff confessed judgment reserving the right of appeal, and made affidavit that he was "unable from his poverty to pay cost or give the security required by law," the words "he is advised and believes he has a good cause of appeal," being omitted. The clerk wrote out the affidavit for plaintiff and entered the appeal.

Upon the call of the case for trial on the appeal, counsel for defendant moved to dismiss the same, on the ground of the defect or omission above stated, in plaintiff's affidavit.

There being no motion to amend, the court dismissed the appeal, and counsel for plaintiff excepted.

STONE & FITCH, for plaintiff in error.

M. M. TIDWELL, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

It is not denied by the plaintiff that the affidavit in this case was defective; nor by the defendant that it was amendable. The only question is, should the court have

Ward and Camp vs. Allen.

allowed the case to have been reinstated? Our opinion is that the application for this purpose should have been granted. No notice was given of the defendant's intention to move to dismiss the appeal. The counsel for the plaintiff could not, therefore, foresee the necessity of having his client present. He announced himself ready for trial when the case was called.

It does not appear that any body would have been injured by the reinstatement of the case. The defendant could not be; and if the bail was, when an attempt is made to charge him, he will be allowed to show that he was ready to surrender his principal in discharge of his bond, but suffered him to go at large when the appeal was dismissed. *Perhaps* he would be entitled to this privilege; on the other hand, it might be said that he is presumed to know the law; and that it was his duty to have retained the custody and control of his principal during the term, if it be the right of the plaintiff to move to reinstate at any time within the term. We do not decide this point. It may never occur.

Judgment reversed.

WARD AND CAMP vs. ALLEN.

If an instrument, by mistake of its author or draftsman, fails to speak his mind, a court of equity will modify the instrument, so as to make it speak his mind.

In Equity, in Fayette superior court. Tried before Judge BULL, March Term, 1858.

The bill alleges that Morris Harris, the father of complainant, Matilda Allen, widow of Coleman A. Allen,

deceased, made and executed the following deed of gift, viz :

Georgia, } Know all men by these presents,
 Fayette County. } that I, Morris Harris, of the county
 and State aforesaid, in full exercise of my right mind, and
 in the fear of God, peace and good order of the State,
 declare that for the love, good will and affection which I
 have for my daughter Matilda, wife of Coleman A. Allen,
 I do, for the love and affection which I have for her, give
 and grant unto her and her children which she now has,
 or which she may hereafter have born unto her present
 husband, or any future husband, the following property,
 to-wit: Tom, a negro man about twenty-two years old ;
 Julia, a negro woman about twenty-two years old ; Linda,
 a girl about sixteen years old, and all future increase of
 them ; and I further give and grant, in a separate manner
 unto her son, Morris Harris Allen, my negro boy Daniel,
 about two years old, and lot of land No. 208, in the 5th
 district, of originally Henry, now Fayette county ; all of
 which property I give and bequeath at my death to my
 daughter Matilda and her children, in such manner and
 by design that her present husband shall not be entitled
 to it, or have control of the same in any way whatever,
 and I hereby appoint Jesse Ward trustee of property
 herein named for the purpose aforesaid, for the use and
 sole benefit of my daughter and her children. To have
 and to hold the said property separate from my other
 heirs, and I hereby oblige my other heirs and representa-
 tives to warrant and forever defend the title of the above
 specified property. In witness whereof, I hereunto set
 my hand and and seal, this 12th day of April, 1845.

(Signed.) MORRIS HARRIS. [L. S.]

Signed, sealed and delivered }
 in presence of }
 Jesse Ward,
 John Harrison,
 R. Malone Stell.

The bill further states, that said deed, after its execution, was delivered by Harris to Jesse Ward, the trustee therein appointed, with instructions to have it recorded, which he did on the 20th day of the same month, to-wit: 20th April, 1845. The bill further states and charges that the purpose and intention of her father was to convey said property to her and her children under the limitations and restrictions mentioned by deed, but that owing to the mistake or misconception of the draftsman of said instrument, who was unlearned in the law and unskilled in drawing such instruments, the paper executed may be held a will, and as such revoked by the last will and testament of said Morris, subsequently executed, and which has been duly admitted to record in the proper office. That after her father's death, the executor of his will, Abner Camp, delivered said property to Jesse Ward, the aforesaid trustee, who allowed her and her husband to remain in possession of said property for some time, and treated said paper as a deed, and recognised and admitted complainant's and her children's right and title to the same, as donees whose interest vested in and under said deed at the time of its execution.

The bill further states that Ward, the trustee, combining with Camp, the executor aforesaid, has taken said negroes from the possession of complainant and her children, and has delivered them to said Camp, who resides in the county of Henry, and by whom they are now held, and who is in the enjoyment of the hire and profits of said negroes and their increase, and complainant is thus deprived of their services, and her right and title to the same denied.

The bill prays that the paper be reformed in pursuance of the donor's instructions and intentions, and that it be set up and declared a deed; that the property therein mentioned be delivered and restored to complainant and her children, and that defendants account for the hire,

labor and profits of said negroes since they came into their possession.

Defendants demurred to the bill for want of equity, and that parol evidence was inadmissible to shew or explain the intention of the testator, and that he intended the paper sought to be set up and reformed, as a deed and not a will.

The presiding judge overruled the demurrer, and defendants excepted and assign said decision as error.

L. T. DOYAL, and HAMMOND & SON, for plaintiffs in error.

M. M. TIDWELL, *contra*.

By the Court.—BENNING, J., delivering the opinion.

Was the court below right in overruling the demurrer to the bill? We think so.

The grounds of the demurrer were, 1st, that the bill had no equity in it; 2d, that parol evidence was not admissible, to show what was intended by the instrument.

If an instrument, by mistake of its author, or his draftsman, does not speak his mind, a court of equity will modify the instrument so as to make it speak his mind. (Wyche and wife vs. Green, 16 Geo. Rep., 49.) And it will hear verbal evidence as to what his mind was.

It follows, then, that there was equity in this bill, if the bill states, that by mistake the instrument does not express what was the intention of Morris Harris, its author, and also states what that intention was.

And these statements the bill makes. It says, in substance, that the instrument is a will, and not a deed; and that a will was a thing that could not express the mind or intention of the author, Morris Harris; that his intention was, to make a deed; and a deed by which he would reserve to himself the use of the property for his life, and

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convey the remainder in the property, to a trustee, for the separate use of his daughter, Mrs. Allen, for her life, and at her death, to her children. And the bill sets out the instrument. And it states that mistake was the cause why the instrument was thus made.

Now, if the bill is right in saying, that the instrument is a will, and not a deed, it is clear that the instrument does not speak what the bill states was the intention of Harris, its author; and therefore, it is clear that there was equity in the bill. I, myself, however, am very much inclined to think, that the instrument, as it stands, is a deed—that it is an instrument which conveys to Mrs. Allen and her children, a present right to the future enjoyment of the property—the enjoyment of it at the donor's death; and by necessary implication, reserving to him all the other interest in the property; that is, reserving to him an estate in it for his life. But, even if it was a deed, and of this import, it would not express what the bill states to have been the donor's intention; the bill stating that intention to have been, to convey the remainder after the donor's death, to Mrs. Allen, for her life, and at her death to her children. So that, even if the instrument be a deed, it needs reforming, if we take the statement of the bill as true, and consequently, even in that case, there is equity in the bill.

Judgment affirmed.

COLEMAN vs. THE STATE.

1. It is no excuse for an assault, that the party assailed says, that if assailed, it will be at the risk of the assailant.

2. A juror's oath cannot be received to impeach his verdict.
3. Newly discovered evidence, if merely cumulative, is not a sufficient ground for a new trial.

Assault with intent to murder, from Fayette county.
Tried before Judge BULL, at September Term, 1858.

This was an indictment against William Coleman and Hardy Richardson for an assault with intent to murder one Jackson Grizzard.

The defendants severed, and Coleman was put upon his trial, and the following is the

Brief of Evidence. For the State.

Jackson Grizzard, the prosecutor, testified that on the last day of December, 1855, in Fayette county, he was going on the road and came in sight of the grocery. Some men were in the road before the grocery, who, when witness and Daniel D. Mims came in sight, raised a halloo. When witness came near the grocery, defendant and Hardy Richardson came out of the grocery, and came meeting witness and Mims. Coleman had his arms folded on his breast—had a weight—witness thought a four pound iron weight. He threw the weight and struck witness on the side—nearly knocked the breath out of him—witness caught on his horse's withers, when Coleman struck him with a rock or weight on the shoulder, and jerked witness off his horse, and he and Richardson commenced stamping him: that is the last he recollects, till some time in the night he came to, and found Dr. Wilson standing by his bed. The assault was made about one o'clock in the day. Witness was confined to his bed some five or six weeks—gave defendant and Richardson no provocation—had not spoken, only nodded his head when they met.

Cross-Examined.—The difficulty occurred fifty or sixty yards from the grocery in front of Walker's gate.

Walker's house is some twelve or fifteen steps from the grocery. Defendant and Richardson met witness and Mims at the gate—witness was going along on his horse in a walk, when he received the lick; when Coleman passed Mims he turned and threw the weight. Witness did not tell Willis Baker at the school-house, that day, that he was going down to Red Oak to make a light hole through Coleman. There had been a fight the day after Christmas between witness and Coleman—Coleman was some six or eight feet from witness when he threw the weight.

David D. Mims testified, that when he and Grizzard got in sight of the grocery, some men commenced to halloo. When they got nearer, Coleman and Richardson came meeting witness and Grizzard—as Coleman passed witness he threw the weight and struck Grizzard on the side—Grizzard fell on his horse's wethers and Coleman pulled him off. Witness then got down and Richardson approached with a weight in his hand—witness told him not to strike him and he did not. Richardson then kicked up against the palings saying he was one of the best men. Witness then turned to the others who were fighting—other persons came up and took them off. Richardson had also jumped on the old man. Coleman's brother requested witness to assist in getting them apart, and he did so. Witness and Grizzard's son, carried him home—he appeared to be insensible and badly hurt. Witness saw the weight before Coleman threw it—thought it a four pound weight—saw no attempt on the part of Grizzard to strike or fight—Coleman was fighting him—Grizzard appeared to be helpless.

Cross-Examined.—Saw Coleman and Richardson both striking Grizzard—does not think he saw them both strike at the same time.

J. J. Cook testified, that he was at Red Oak on the day of the difficulty—saw Mims and Grizzard coming along the road. Richardson got on a stump and made some

kind of a noise, then went into the grocery—saw him and Coleman come out and go down the road, Coleman in front. They met Grizzard and Mims—saw Coleman throw at Grizzard—heard the lick—did not see the instrument—they seemed to pull him off his horse. Coleman and Richardson then both struck him right smart—does not think they were both on him at the same time.

Cross-Examined.—Thinks Coleman was fifteen or twenty feet from Grizzard, when he threw the weight—heard it told that day in Coleman's presence, that Grizzard was going by there to Luck's—the grocery was in the way to Luck's.

Dr. Jno. S. Wilson testified that he was called to see Grizzard on the 1st January, 1856—found some two of his ribs broken on the left side—some small bruises about the abdomen—saw him two or three times afterwards—he was down some two or three weeks, probably longer.

Evidence for Defendant.

Raymond Coleman testified that he saw the difficulty. Grizzard was coming up the road, and defendant was going down, and they met at Walker's gate. Defendant lived at Walker's—had started there when they met—defendant raised up his head and said, "how do you do, gentlemen?" Grizzard checked his horse and put his hand in his left coat pocket—turned towards defendant, pulled his hand out, and about that time they went to fighting—Coleman pitched at him—did not know whether he threw anything or not. When Grizzard pulled out his left hand, he put his right into his right pocket. On that morning heard Baker say in the presence of defendant, at the grocery: "Boys, look out, the Grizzards said they are coming down and would blow day-light through you." Defendant struck at Grizzard—Grizzard got off his horse, and they went to fighting. Richardson caught defendant by the arm or shirt and jerked him back. Grizzard

walked off some ten feet—Richardson then went up to him, and jumped on him and downed him. Grizzard appeared to be going back. Defendant was ten or twelve feet from Grizzard when he threw.

Cross-Examined.—Saw the weight—one of the weights about the grocery—Baker's statement about the Grizzards was about 10 or 11 o'clock in the morning—thought Coleman's blows were light, but Richardson's were severe—saw Richardson throw a weight at Thos. Grizzard.

John A. Adams testified, that he saw the difficulty—saw the parties meet—Coleman said, "how do you do, gentlemen?" Grizzard seemed to throw himself on his nag as if he meant to draw something out—with that Coleman struck him—Grizzard stayed on his horse till Coleman took him off—Richardson pulled Coleman off and took his place. Heard Baker tell Coleman that the Grizzards said they were going by home to prepare themselves, and that they would be down and make day-light shine through them. Heard Grizzard say afterwards, that he did not blame Coleman, and was sorry it had ever taken place—was within ten or fifteen feet of the parties when the fight took place.

Mrs. Walker testified, that she was standing in her piazza and saw Coleman meet Grizzard and Mims—he said, "good morning, gentlemen"—Mims spoke but Grizzard did not—stopped and turned the head of his horse towards the house—had the bridle in his left hand—put his right hand in his bosom—dropped it and put in his left hand, and she saw something strike him—Coleman went up to him and he came off his horse—don't know whether he got off or was pulled off—they then went to fighting—Coleman, with an oath, asked him if he would crowd him again—Grizzard replied he never would—Richardson came up and told Coleman that was enough—they then left off—the crowd gathered round and witness saw no more. Grizzard went to his horse—his son

Thad. went to help him—he objected to his helping him, saying he hurt him, and got on the horse himself, and went off. Mims staid sometime talking after Grizzard left. Coleman was staying at witness' house.

Cross-Examined.—Shortly after the difficulty witness did say that if she had known that Coleman was going to do so, she would not have let him go up. She said this, because she was sorry the fray took place.

Dennis Baker testified, that he was at the school-house that day—had not heard Grizzard use any threats against Coleman—did not, on that day at the grocery, tell or say in the presence of Coleman, any such thing as blowing day-light through him—told them he had heard Joseph Grizzard say that they were coming down there, and that if any of them jumped on them, they would do it at their own risk.

Cross-Examined.—Did not tell Miss Ann Coleman on the day after the difficulty, or the same day, “that if Coleman had killed Grizzard, he knew enough to clear him.”

J. J. Cook, re-examined. Heard Baker tell Coleman and others, at Red Oak, that he had heard Joseph Grizzard say, he was coming down, and that if any of them jumped on him, they would do it at their own risk.

William Cromby testified, that he heard Raymond Colemay say, that if it had not been for him, he believed they would have killed the old man Grizzard. Heard Grizzard say in the conversation testified to by Adams, that he blamed others more than he did Coleman—that was his remark.

The jury found the defendant guilty, whereupon his counsel moved for a new trial:

1st. Because the verdict is contrary to the law and evidence.

2nd. Because the presiding judge erred in not permitting prisoner's counsel to ask Dennis Baker what gave

rise to the conversation at the school-house as to the threats of the Grizzards against prisoner.

3rd. Because the jury who found the verdict, were not agreed—it being the verdict only of a majority, to which a minority did not assent, as appears by affidavit of one of the jury.

4th. Because of newly discovered evidence.

The court refused the motion for a new trial, and defendant excepted.

WHITAKER & BATES, and OVERBY & BLECKLY, for plaintiff in error.

Sol. Gen., *contra*.

By the Court.—BENNING, J., delivering the opinion.

Was the court right in refusing the new trial? We think so.

As to the first ground of the motion for a new trial, we think there was a plenty of evidence to support the verdict.

As to the second—

1st. The “conversation” itself, at the school-house, was not material. It is no justification or palliation of an assault on a man, that he says, that if he should be assailed, it will be at the risk of the assailant. And if the conversation itself was not material, how could what “gave rise” to it, be material?

Besides, the party assaulted, *Jackson* Grizzard, was not present at the conversation. How could any thing in a conversation among other persons, justify an assault on him? At least, there is nothing in the record, to show how it could.

As to the third—

2nd. The affidavit of a juror, made after the rendition

of his verdict, is not admissible to impeach the verdict. This is well settled.

As to the fourth and last ground—

This was the newly discovered evidence of Bartly Walker and his wife. This evidence was merely cumulative, if not, also, immaterial.

Judgment affirmed.

GORMAN vs. HAMMOND.

A part of the 8th section of the tax act of 1804, says, that "If any person" "shall be convicted of" "making a false return" of his "taxable property," "he" "shall be liable to pay to the Clerk of the inferior court of the county, a fine of ten dollars for every hundred dollars valuation so neglected or concealed."

Held, That this part has been repealed, and still stands repealed.

Debt from Campbell county. Decision by Judge HAMMOND, at March Term, 1859.

This was an action of debt brought by G. W. Hammond, clerk of the inferior court of said county, upon the information of Stephen Rentfroe, for the use of said county and informer, against Clayborn Gorman.

This action was brought under the 8th section of the act of 1804, for making a false return of defendant's taxable property.

The declaration alleges that defendant gave in his lands to the receiver of tax returns, worth twelve thousand, at eight thousand six hundred dollars—that he gave in his negroes, worth twenty-five thousand dollars, at ten thousand dollars.

Defendant demurred to the declaration upon the following grounds:

1st. That there was no law authorizing said suit or action.

2d. That the declaration does not allege that defendant failed to return all of his taxable property; nor does it show what property was withheld.

3d. That the cause of action was barred by the statute of limitations, especially that portion relating to the return of 1857.

4th. That there was no order or authority from the inferior court of said county, to institute said action.

The court overruled the demurrer on all the grounds, except that part of the third ground, relating to the return of 1857, which was sustained. The court holding that the action as to that year was barred by the statute of limitations. And to this decision defendant excepted.

STONE & FITCH, and TIDWELL, for plaintiff in error.

BLALOCK, *contra*.

Judge McDONALD did not preside in this case, being absent on account of indisposition.

By the Court.—BENNING, J., delivering the opinion.

Ought the court below to have sustained the demurrer to the declaration?

The first ground of the demurrer, was, "that there was no law authorizing said suit or action. Was that a good ground?

The action is founded on a part of the eighth section of the tax act of 1804. That section is as follows:

"If any person or persons, shall neglect or refuse to give in a return of his, her or their taxable property, or shall be convicted of fraud or making a false return thereof, he, she

or they shall be liable to pay to the clerk of the inferior court of the county, a fine of ten dollars, for every hundred dollars valuation so neglected or concealed, one-half whereof for the use of the county, under the direction of the inferior court, and the other half for the use of the informer or informers, to be recovered in any court having cognizance of the same. (Cobb Dig. 1047.) The part of the section on which the action is founded, is that part which I have put in italics.

The ground of the demurrer, therefore, amounts to this: that this part "was no law"; in other words, that this part had been repealed. Is that so? Has it been repealed?

It was argued that it was repealed by a part of the fourth section of the tax act of 1845. That section is as follows: "*If any person shall fail to make a return of taxable property under this act, such persons shall be doubly taxed for the first year, trebly taxed for the second year, and increasing in the same ratio each year, until a return is made; and if any person make a false or partial return, a double tax shall be assessed by the justices of the inferior court of the county in which such false or partial return is made, or [on] report of such fact to them by the receiver of tax returns, and at least three day's notice to such person, by order of the justices of said county.*" (Cobb, 1076.) The part of the section meant, was the part which I have put in italics.

Does this part of the act of 1845, repeal the part aforesaid of the act of 1804?

Both of the two parts prescribe a penalty for the same act—"a false return" "*of taxable property;*" and the penalty prescribed by the one, is not the same as that prescribed by the other; and, it is a rule, that when there are two statutes imposing a penalty, for the same offence, and the penalty imposed by the one is not the same as that imposed by the other, the later statute repeals the earlier—the intention to inflict two punishments for the same of-

fence, being a thing not to be imputed to the legislature. Therefore, the part of the act of 1845, *does* repeal the part of the earlier act of 1804.

That part of the act of 1804, having been thus repealed, has it remained repealed? It has, of course, unless it has been revived by some act subsequent to the act of 1845. Is there any such act that revived it? If there is, we may safely assume that it was some of the tax acts. Is there any tax act that revived it?

The first tax act, after the act of 1845, is the tax act of 1847. That act revives the tax act of 1845—the repealing act. Of course, therefore, that act does not revive the part of the act of 1804, but keeps it repealed. (Cobb, 1078.)

The next tax act is that of 1850. That act re-enacts the act of 1847, “for the political years 1850 and 1851, and for each year thereafter, until repealed.” That act, therefore, revives, or rather, keeps alive the act of 1845, and makes it perpetual, and consequently it, instead of reviving the part of the act of 1804, renders its state of repeal indefinite.

The next tax act is that of 1852. That act does not contain any provision on the subject of the “*false return*” of taxable property. Therefore, it does not contain any provision against which the part of the act of 1845, revived and made perpetual as aforesaid by the act of 1850, could militate—that part relating exclusively to “a false return” of taxable property. And the repealing clause of the act of 1852, is as follows: “That all laws and parts of laws militating against this act, except such part of the tax acts now in force in this State, as may be necessary to carry out this act, and which are declared in full force, be and the same are hereby repealed.” (Acts 1851-’52, 292.) Consequently, as the part aforesaid of the act of 1845, revived and made perpetual as aforesaid, by the act of 1850, does not militate against it, that part is not re-

pealed by it. And, therefore, the part of the act of 1804, is not revived by it.

The next tax act is that of 1854. This continues in force all of the act of 1852, except its 12th and 15th sections, which two it alters, but not so as to make them conflicting with the part aforesaid of the act of 1845. Hence, this act could not revive the part of the act of 1804.

I remark, that even if the part of the act of 1845, militated against either the act of 1854, or the act of 1852, and was, therefore, repealed by either of those acts, the part of the act of 1804, equally did so, and therefore, that such repeal of the part of the act of 1845, could not operate to revive the part of the act of 1804.

Neither in 1856, nor in 1857, was there any general tax law passed. In each of those years, a few unimportant acts bearing on subjects connected with taxation, were passed, but not one of such acts contained any provision on the subject of the "false return" of taxable property. None of these acts, then, could revive the part aforesaid of the act of 1804.

Thus far, then, there is no act to be found which repeals the part of the act of 1845, which repeals the part of the act of 1804, and, consequently, no act which revives the part of the act of 1804.

The next and last act was that of 1858, to make the receivers of tax returns assessors in certain cases. The first two sections of that act are as follows:

"That from and immediately after passage of this act, it shall be the duty of each receiver of tax returns in the several counties of this State, to examine carefully each return presented to him; and if in his judgment he shall find the property embraced in said return, returned below the value thereof, it shall be his duty to assess the value thereon."

"That in case the individual making such return, shall

consider the assessment made by the receiver too large, he shall be permitted to leave it to three disinterested persons, one of whom he shall select, and the receiver shall select one, and these two shall select a third party, a majority of whom shall determine the amount of assessment on the property embraced in each return." (Briscoe's Dig. of Tax Laws, 30.)

These sections are on the subject of "the false return" of taxable property, for, a return of taxable property, "below the value thereof" is a false return; and the penalty which they impose, is different from that imposed by the act of 1845, and probably, less than that. The penalty they impose is an assessment by the tax receiver, subject to be revised by arbitrators, at the option of the person making the return. The penalty imposed by the act of 1845, was a double tax assessed by the inferior court, on three days' notice to the person making the false return. It would seem, then, that they repeal the act of 1845. But if they do, they equally keep the act of 1804, in a state of repeal; for the punishment they inflict, differs more from the punishment inflicted by that act, than it does from the punishment inflicted by the act of 1845. Therefore, if they suffice to repeal the act of 1845, much more must they suffice to keep the act of 1804 repealed.

Even if the act of 1804 had been in force, this act of 1858 would itself have repealed it; and that repeal would alone—though coming so late—have defeated this action. It would have taken from under the action its foundation. (See *Bank of St. Mary's vs. Clayton*, 12 Ga.)

Thus, then, it appears, that there is no act which revives the part of the act of 1804, giving the present action. It is not pretended that if this part of the act of 1804, does not give the action, there is anything that does. Consequently, it must follow that this first ground of the motion to dismiss this action was good, viz: the ground that there was no law authorizing the action.

Now, what is there contrary to this conclusion? A decision of this court, it is said—the decision in *Payne vs. Coursey*. (20 Ga. 585.) Even if that were true, the effect would be to show not the conclusion, but the decision erroneous. But is it true? We think not. In that case, it is true that the declaration was just like it is in the present case; and, that the decision of this court was that the action lay; but it is not true, that the question on which that decision was made is the same as the question on which the decision in this case is to be made. The question in this case is, whether the part of the statute on which both actions were brought, is in force; in that case, it was assumed on both sides, that the part of the statute was in force; and that the only question made, was, whether it, thus taken to be in force, had been followed by the declaration—whether in other words—the declaration was such as to bring the case within this part of the statute. This part says, it will be remembered, that, if any person shall be *convicted* of making a false return of his taxable property he shall be liable to pay a fine of ten dollars, &c. The defendant's point was, that as the declaration failed to allege that he had been *convicted* of making such false return, the declaration failed to bring the case within this part of the statute; and, therefore, that the declaration was insufficient, judged by the part of the statute itself. And a plausible point it was. He did not insist that the statute had been repealed. He assumed that it had not been, for he relied on it himself, his point being that the statute itself required a conviction as a prerequisite to the action. The decision of this court was that the action lay; but that was merely saying that the objection made to its lying was not good—was merely saying that it was not true; that the statute itself made a conviction, a prerequisite of the action. Every decision—every book—every writing—every discourse—is to be taken in reference to the facts on which it is made. That the question

was what I have stated that it was, is sufficiently apparent from the facts of the case, as reported. "At the trial, counsel for defendant moved the court to dismiss the action, on the ground that the same cannot be maintained under the law and the pleadings." (20 Ga. 586.) What is this but saying that the ground of the objection was that the relation borne by the *pleadings* to the *law* was such that the action was not maintainable? And what pleadings and what law were obviously meant? The declaration, and the law on which the declaration was founded, viz: the part aforesaid of the 8th section of the act of 1804. What relation between these was meant? The relation growing out of the absence from the declaration of an allegation that the defendant had been "*convicted*" of making the false return charged against him—this part of the section declaring, that if any person should be "*convicted*" of such a false return he should be "liable" to the action. The decision of this court was, that the defendant was liable to the action—this objection to the contrary notwithstanding. That is all. It is true that the court, in delivering judgment, uses this language: "By the 8th section of the tax act of 1804, which is perpetuated by subsequent statutes," &c.; and thus, incidentally assumes that the section is still in force. But was that strange when the counsel on both sides had assumed that it was in force—the counsel for the plaintiff insisting that it sustained his declaration; counsel for the defendant insisting that it sustained his demurrer? And it may be right to say, that if any blame is imputable to the court for being seduced into this assumption, it is a blame to be borne by me and Judge Lumpkin; for Judge McDonald did not preside in the case—ill health preventing him from attending the Court at the term at which the case was decided.

We think, then, that this ground of the motion was good. We think that the part of the 8th section of the

tax act of 1804, on which part the action is founded, is not in force. Holding this ground to be good, it is needless to consider the other ground. Therefore, we leave them without giving them further notice.

Judgment reversed.

SIMS vs. MACON & WESTERN R. R. COMPANY.

1. Sayings are not admissible as a part of the *res gesta*, if it appears that they were uttered at an indefinite time, after the happening of the thing to which they relate.
2. A rail road company is not liable for a loss occasioned by a collision of its trains, if its agents used ordinary care to prevent the collision, and if the party suffering the loss was guilty of gross negligence.

Nonsuit, in Pike superior court. Decision by Judge CABANISS, at October Term, 1858.

This was a proceeding under the statute, by Sherrod Sims against the Macon & Western Railroad Company, to recover the value of a negro man slave, killed by said road.

It appeared from the evidence of plaintiff, that the negro, about fifty years old, was sitting on the end of a cross-tie on said road, and was struck by the cow-catcher attached to the front of the locomotive, and killed—he was sitting on the outside of the road, but the cow-catcher being wider than the road, he was caught by it and terribly mangled, and killed instantly. He could have been seen by the engineer at the distance of several hundred yards—the whistle was not blown until the cars came within about twenty steps of him—he gave no heed to

the notice, (the presumption is he was asleep,) and was struck and killed as above stated. It was a timber train proceeding down grade at the rate of about twenty miles per hour, and the place was not at or near any crossing, and it was in the day and the sun shining. The negro was sober and of good character, and worth about a thousand dollars. He could have seen the train a thousand yards up the road. When killed he was sitting with his axe up between his legs—his thigh and leg were torn off.

The case was submitted to a jury under the provisions of the act of —, who found for the plaintiff one thousand dollars, from which verdict defendant appealed.

Upon the trial on appeal before Judge Cabaniss, the plaintiff offered to prove the saying and declarations of the conductor and engineer in relation to the killing. These sayings were made at Milner, a station about a mile below where the accident occurred, and after the train arrived there, and while stopping there. The train had previously stopped a short time immediately after the accident occurred. Defendant's counsel objected, and the court sustained the objection and repelled the evidence, on the ground that the sayings were not made when the killing occurred, and that they were made when not acting as agents for defendant, and that they constituted no part of the *res gestæ*. And plaintiff excepted.

Plaintiff having closed, defendant's counsel moved for a non-suit, on the ground that the proof showed that defendant was not liable. The court sustained the motion and ordered a non-suit, and plaintiff excepted.

GREEN & STUART, and FLOYD, for plaintiff in error.

MOORE, GIBSON, and PEEPLES, *contra*.

By the Court.—BENNING, J., delivering the opinion.

1. Was the court below right in rejecting the sayings

of the conductor and engineer? We think so. To make those sayings admissible, it ought to have appeared that they were a part of the *res gestæ*. But that did not appear. The evidence did not show what was the interval between the accident and the sayings, but it did show that it must have been a considerable interval. The train stopped immediately after the accident; it then ran to Milner, a mile off, and stopped again; after its halt there, the words were spoken, but how long after does not appear. For ought that appears, the interval between the accident and the sayings, was quite long enough to take the sayings out of the rule as to the *res gestæ*. (See *Mac. & Wes. R. R. vs. Davis*, decided at Macon, January, 1859.)

Was the court below right in granting the non-suit? We think so.

The case, on the part of the suffering party, Sims, was a case of the grossest negligence. There is not a single thing to serve as an excuse for his negro's being on the rail road track of the company; and that track was a place of notorious danger. To go asleep in such a place, could be nothing short of an act of the grossest negligence. And yet, that, probably, is what the negro did.

Assuming, then, that Sims, the losing party, was guilty of gross negligence, (the conduct of his negro being *pro hac vice*, his conduct,) could he be entitled to an action against the rail road company, whose train produced the loss? We are not clear that he could be. In the cases between the Macon & Western Railroad Company vs. Wynn, and between it and Davis, this court held that the company was liable, if it could have avoided the collision by the use of ordinary diligence; although it might be true, that the other party was guilty of some degree of negligence. But, in those cases, the negligence of the suffering parties did not rise to gross negligence.

Concede, however, that the rule ought to be the same in the case in which the negligence of the suffering party

does amount to gross negligence, then the question will be, whether, in the present case, the rail road company, by its agents, used ordinary care to prevent the accident?

The train was, probably, a thousand yards from the negro when he first became visible to the engineman. If the negro was awake, he, it is to be presumed, was aware of the approach of the train, even before it had come within sight of him. The noise of a running train is of itself, commonly sufficient to be heard, and to attract the notice of a person ordinarily attentive, when it is more than one thousand yards off. If a person on a rail road track, as a trespasser, is aware of the approach of a train, it is his duty to get off the track, out of the way of the train, and it is not the duty of the engine-man to stop the train, or even to blow the whistle; certainly, it cannot be his duty to blow the whistle until the train has come almost quite up to the person. Of what use could it be? This, I suppose, will not be disputed.

The whistle was blown in the present case, when the engine was twenty steps from the negro—a distance amply sufficient to admit of his escape from the track, if he was awake.

If then the negro was awake, the answer to the question will be, that the agents of the company *did* use ordinary care to prevent the accident.

Whether the negro was awake or was asleep, we cannot know. But, at first, the engine-man had the right to presume that he was awake. He was sitting up, not lying down—sitting on the end of a cross-tie. This, commonly, is the attitude of a person awake. The engine-man then, had, at first, the right to presume the negro to be awake. And whatever presumption he had the right to make, he had the right to act on.

How long did his right to make this presumption continue? It continued until the train approached so near to the negro that an ordinary person, in his place, if awake,

would have begun to move aside. How near would that be ?

The negro was sitting on the end of a cross-tie, and was beyond the reach of every part of the train, except one of the side angles of the cow-catcher. A few inches change of place would have put him quite beyond the reach of this angle of the cow-catcher. The effort that such a change of place would have cost him, would have been very slight, and the time required for the change, would have been little more than an instant. Now, an ordinary person, thus situated, if awake, would probably not begin to move aside, until the train came within some forty or fifty feet of him. It follows then, that in the present case, the engine-man would have the right to continue the presumption that the negro was awake, until the train had reached within forty or fifty feet of the negro ; and consequently, that he would have the right to act on this presumption, until he came within that distance of the negro. And longer than this, he did not act on the presumption ; he blew the whistle and tried to stop the train when the train was twenty steps from the negro.

At least, it would be conceded, I suppose, that he had the right to act on this presumption, until the engine had come within eighty or ninety yards of the negro. But if so, then he had the right to act on it until it would have been too late to prevent the accident, strive as he might, to prevent it. The testimony was, that it required from one hundred to one hundred and fifty yards within which to stop the train ; the whistle was blown when the engine was still as much as twenty steps from the negro, and the blast had no effect on him ; which shows, in all probability, if it had been blown for eighty or ninety yards, the more distant blast would have been, at least, equally ineffectual. So that, even if the engine-man, when eighty or ninety yards off, had commenced blowing the whistle, and stopping the train, it would have done no good.

 Evans vs. Smith.

Even, then, if the negro was asleep, the answer to the question must be the same; namely, that the agents of the company *did* use ordinary care to prevent the accident.

There is no other question, consequently, the judgments of the lower court are affirmed.

Judgment affirmed.

 EVANS vs. SMITH.

Two sisters, Jincey and Patsey, executed an instrument, which was, in substance, as follows :

"Know all men, that we, Jincey and Patsey, do 'covenant and agree,' that, for the love we bear to each other, whichever of us may be the longest lived, shall be the heir of the other."

Held, That the instrument was a will.

Caveat to Will, from Fayette superior court. Tried before Judge BULL, at September Term, 1858.

Martha T. Smith, propounded for record and probate in the court of Ordinary of Fayette county, the following paper as the last will and testament of Jincey E. Smith, deceased, to-wit :

Georgia,	}	Know all persons by these presents, that we, Jane E. Smith of the one part, and Patsey T. Smith of the other part, both of the State and county aforesaid, have this day covenanted and agreed, and by these presents do each of us covenant and agree with each other, that for and in consideration of the love and affection we have for each other, that we agree and covenant and bind ourselves to each other, that whichever of us it may please the hand of Providence to
Baldwin County,		

remove first by death, the other shall be sole heir to all the estate which the deceased shall or may own, at the time of her death, both real, personal and perishable—that is to say, that should the said Jane E. Smith die and leave the said Patsey T. Smith living, the said Patsey is to be sole heir to all the estate the said Jane E. may or shall own at the time of her death; or that should the said Patsey T. die first and leave the said Jane E. living, then the said Jane E. is to be sole heir to all the estate the said Patsey T. may or shall own at the time of her death; and we further covenant and agree that it shall be the privilege of the one that may or shall be the longest lived, to make whatever disposal of all the property, both real, personal and perishable, that may, in her judgment, be most suitable.

Given under our hands, this the 25th of March, 1856, and in witness whereof we have this day written our names and seals in presence of

R. L. G. Bozeman,	}	JINCEY E. SMITH. [L. S.]
T. C. Mathews,		PATSEY T. SMITH. [L. S.]
Jos. B. Williams.		

B. T. Evans filed his caveat to the probate of said paper as the will of Jane E. Smith, upon the following grounds:

1st. Because said written instrument is not a testamentary disposition of property, nor was it the intention of the said Jincey E. Smith, that it should operate as her last will and testament.

2nd. Because said writing was not executed by said Jincey, and if so, was not executed by her freely and voluntarily, but under persuasion, force and undue influence.

3rd. Because, at the time said instrument of writing purports to bear date, said Jincey was not of sound and disposing mind and memory.

4th. That such instruments are contrary to public policy, and therefore void.



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5th. Because the paper propounded is not a will, but a covenant or agreement, which it required the assent of both parties to change or alter or revoke.

Upon the trial, on appeal, in the superior court, the propounder introduced the following testimony:

Richardson L. G. Bozeman, testified that he knew Jane (or Jincey) E. Smith and Martha (or Patsey) T. Smith, well—they were his aunts—he lived with them from the time he was about one year old until he was twenty-three or four years old—Jane was called in the family Jincey. At the date of the will, and for several years before, witness lived in Alabama. He came over to Fayette to attend to a case in court for his aunts—the case was set down for the first week, and after he got here, it was postponed until Wednesday of the second week. Witness had not seen his aunts for four or five years, and as he had to remain so long, he went out to see them. Jane was in Fayette county, but Patsey was down in Baldwin. Witness concluded to go to see his aunt Patsey, and Jincey said she wanted to go to Baldwin and would go with him—they went together. Sometime after they got there, Jane said one reason she had for coming to Baldwin was to get Iverson L. Harris to write her will. Witness told her she would have to put it off then, for Harris was at Putnam court. Jincey then asked witness to write her will—witness told her he had never done such a thing in his life, and did not know how—that he had written a deed and could do that, but did not know how to write a will. Jincey said she reckoned he could write down what a body wanted, and insisted on his doing it. She then got a half sheet of paper, ink and pen, and brought them and put them on a table, and told witness to write her will. She wished to give her property all to Patsey. Witness commenced writing and wrote "Georgia, Baldwin county;" Patsey then said, "when you get done that I want you to write my will too." Witness told her she

would have to get some more paper then. She replied, after examination, that that was all there was in the house. Witness then asked her how she would make her will; she said, "as I have always told you, I am going to give my property to Jincey." Witness then said, "well, if you are going to will your property to Jincey, and Jincey is going to give hers to you, I dont see why you both can't make your wills on the same piece of paper." Both said they saw no objection to it either. Witness then wrote the instrument propounded, and read it to them, and asked "if it was right?" they said, "yes, they reckoned so." Both of them then signed the will in the presence of the witness, who attested it in their presence. Witness expressed a doubt whether one witness was enough—Jincey said she thought one witness was enough—that she had known of several wills set up by one witness, and that old Mr. Peeple's will, which had been carried out by General Myrick in Baldwin, was set up and had no witness. A day or two after, witness and Jincey left Baldwin, to return to Fayette in time for the case, and as they were riding along, witness picked up a paper in the cars and read a piece which said there was a law which every farmer ought to know, and which few did know, and that was that a will was not good unless it had three witnesses; he read it to his aunt Jane and she made no reply. A day or two after their arrival in Fayette, Jincey, who had taken charge of the will and brought it from Baldwin, told witness to take the paper and carry it to Mr. Stone, and ask him if it would do, and if it would not do, she wanted him to write her one. Witness brought it to Mr. Stone, who said it was not good as it stood, but if Jincey would acknowledge it as her will in the presence of two more witnesses, it would then be a good will as to her. Col. Doyal also said it would then be a good will as to her, but she had better give a lawyer ten dollars to draw one. Witness communicated their

opinions to his aunt Jincey—she said she had no ten dollars to throw away, and if that paper would do with more witnesses, she would have them. A few days after, when witness was about to return to Alabama, Jincey told him not to leave yet, that she had sent for Mr. Williams and Mr. Mathews to come and witness her will, and they would be there directly. Witness waited, and in a little while Mathews and Williams came. Jincey brought out the paper and showed it to them, and it was read to her again. She then said, putting her finger on the name, “I scratched or writ that there for my name, and I saw Rich, (witness,) sign it as a witness—this is my will—I want to give my property to Patsey, and want Mathews and Williams to sign it as witnesses.” Mathews and Williams then attested it in the presence of Jincey and all in the presence of each other. Jincey asked if they had not better send for a justice of the peace to witness it also. Mathews said it was not necessary. She said she wanted Patsey to have her property and no body else, and she wanted to make the will good if it took twenty witnesses; after it was executed she gave it to witness and told him to keep it, and after her death he would have to see it carried out. As witness was about to leave, he asked his aunt what should be done about Patsey’s signing the will. She said, “well, when you go to see Patsey again, you can take it with you, and if she is a mind to acknowledge it before witnesses and make it good as to her, she can do so, and if not she can let it alone, it made no difference, and Patsey might give her property to witness or any body else she pleased.” She was all this time of sound and disposing mind and memory, and acted freely and voluntarily, as far as witness knows—he never heard any body in his life persuade her to make a will—has heard her say often, he supposes five hundred times, that she intended to give Patsey her property at her death—never spoke of giving it to any other person.

Patsey and Jincey were twin maiden sisters, and generally lived together, and always kept more or less of their property together. Jincey had two other sisters, the mother of witness, and Nelly G. Evans, who was in the house when the will was acknowledged before Mathews and Williams—she had married Boswell Y. Evans, the caveator, but she was at that time, and had been for years before, living separate from him, and Jincey said she never wanted Evans to get a cent of her property. Jincey was always a woman of great firmness and decision, and ruled everything about her place.

Joseph B. Williams testified, that he had known Jincey E. Smith from 1850 till her death—lived in a quarter of a mile of her—identified the paper propounded—attested it as a witness, in presence of Jincey and at her request, and saw Mathews do so also; all in the presence of each other. He also proved her sanity, health and volition, and testified to the circumstances of the acknowledgement of the paper and her declarations at the time as ptovrd by witness Bozeman. She told witness a day or two before, that she wanted him to come over and witness her will, and on the day sent a boy for him—has often heard her say she was going to will her property to Patsey, and no body else—often heard her say afterwards that this was her will, and she had given her property to Patsey—never heard her speak of giving it to any other person, at any time, nor express a desire to do so. She was a woman of great firmness and decision, and had her own way.

Col. Stone testified that he had seen the paper propounded before—had a business transaction with Jincey E. Smith, and from that, judged her to be a woman of decided firmness—a woman of her own head, and who had her own way and will.

The witness, Bozeman, on his *voire dire*, stated that since the death of Jincey E. Smith, the propounder had made him an absolute deed, conveying to him all the

property owned by Jincey at the time of her death, which was on record, but that he had relinquished afterwards all his interest in the same to the propounder, which was also on record, and that he had then, no interest in the case.

Counsel for caveator objected to all the foregoing evidence, so far as it was intended to affect the language or terms of said instrument, or to give it the effect and operation of a will.

The paper propounded was then tendered in evidence, and counsel for caveator objected to its introduction—the objection was overruled by the court, and the paper read to the jury as the last will and testament of deceased, and counsel excepted.

The jury found for the propounder, and set up the paper as the last will and testament of Jincey E. Smith, deceased; whereupon counsel for caveator tendered his bill of exceptions, assigning as error the foregoing decisions of the court.

OVERBY & BLECKLEY, and TIDWELL & WOOTTEN, for plaintiff in error.

HUIE & CONNOR, and B. H. HILL, *contra*.

By the Court.—BENNING, J., delivering the opinion.

The exceptions are two—one to the admission of the verbal evidence as to intention; the other to the admission of the paper as a will.

The object of this verbal evidence was, to show that the paper was a will; and whether the evidence was admissible or not, depended on, whether showing that, would have been to contradict the paper. If showing that, would have been consistent with the terms of the paper, then, to show that would not have been a violation

of any rule of which we are aware. There is no rule that excludes parol evidence consistent with the writing to which it relates.

The question then is this; was the paper such, that, it might, on its face, be read as a will—as the will of Jincey Smith? And we think it was.

The *words* will bear that construction. If we take the mere words, we may say, that the instrument was a double will—the will of each sister. The words will well bear the following meaning, viz: “I, Jincey, out of my love for Patsey, do agree to make her my heir if she outlives me; and I, Patsey, out of my love for my sister Jincey, do agree to make her my heir if she outlives me.” The consideration of each sister is her love for the other—not this agreement of the other. The making of the instrument by the one sister, is not the consideration for the making of it by the other. No; the making of it by the one, is an act entirely independent of the making of it by the other. The case is, in substance, precisely the same as it would have been, if each sister had executed a separate paper, and had said in that paper just what makes her part in the joint paper. The mere *words*, I say, authorize this conclusion. Suppose, then, that each sister had executed a separate instrument, and in it had expressed the same ideas which she expressed in the joint instrument, would these instruments not be wills? What would there be to prevent them from being wills—assuming, of course, that they were properly attested, and were otherwise regular as to form? Nothing, as far as we can see. They would be instruments merely in consideration of love; therefore, they would be revocable at pleasure; they would be instruments not to take effect until the death of their respective makers; therefore, they would not be deeds, for deeds take effect at their execution. Then, they would be wills, or they would be nothing. It is true, that they would be in form, *covenants* to convey,

and not actual conveyances. But a will may take the form of most, if not of all other instruments. It may take the form of a covenant. In *Coop vs. Coop*, the instrument was in these words: "By this deed I bind myself to give to my wife, either upon the demise of her mother, or the sale of the Yorkshire estate," &c., &. "I do, therefore, hereby ordain that my executors, administrators and assigns, consider this deed as the most solemn obligation, in confirmation of which, I set my hand and seal." This instrument, though in form, only a bond, or covenant, was held to operate as a will. Note to *Thorald vs. Thorald*, 1 Eccl. Rep., 15. Indeed, mere precatory words often amount to a will.

Two cases were read to show that this was an instrument "unknown to the *testamentary* law." The first was the case of *Hobson vs. Blackburn* 2, Eccl. Rep., 116. But in that case, the *execution* of the paper by each one of the parties to it, was clearly the consideration for the execution of it by the other; and that distinguishes the case from this.

The other case was in the 2d of Dev. & Bat. 558, and it seems to be distinguishable in the same way from this.

If, then, we confine ourselves to the mere words of this instrument, we must conclude that it is a will.

It follows, therefore, that verbal evidence going to show that it was a will, was entirely consistent with it, and was, therefore, admissible.

And that evidence once in, the case became clear beyond a doubt, that the paper was a will. The evidence of *Bozeman* on the point, is so full, so minute, so simple, and every way so likely, that it is irresistible.

We think, then, that the court was right, both in admitting the verbal evidence, and in holding that the instrument was a will.

Judgment affirmed.

AARON vs. BAYNE.

Although a vendor of land merely gives a bond to make titles on payment of the purchase money, thus retaining in himself the legal title, yet his widow is not entitled to dower in the land.

Dower, from Newton county. Decision by Judge CARANISS, at September Term, 1858.

This was an application for dower on the part of Robert Bayne, and Martha C. Bayne, his wife, formerly Martha C. Dunn, widow of William G. Dunn, deceased, late of the county of Jasper.

The petition stated that William G. Dunn, deceased, the late husband of Mrs. Bayne, departed this life testate on the 6th January, 1856, and that letters testamentary were granted to James C. Aaron—that during the coverture and at the time of his death, testator was seized and possessed of a lot of land situated in the county of Newton, containing two hundred two and a half acres—that Mrs. Bayne had not relinquished her right of dower in and to said lands; nor had there been any estate of her late husband conveyed, allowed or assigned to, or received by her in lieu of dower in said premises.

It appeared at the trial, that William G. Dunn, the late husband of Mrs. Bayne, in his life time, to wit, on the 26th November, 1853, sold the lot of lands in question to Benjamin T. Tuggle, and executed and delivered to him bond for titles. Tuggle assigned and transferred this bond to one Mitchell Aaron, on the 19th day of August, 1856. Tuggle gave his notes for the purchase money at the time he received the bond, and was in possession two years before Dunn's death. The land was in fact sold by Tuggle to James C. Aaron, the executor, but it was

Aaron vs. Bayne.

arranged that the bond should be transferred to, and the titles pass through, Mitchell Aaron. The notes for the purchase money were not paid until after Dunn's death, and then they were paid or taken up by this sale of the land to James C. Aaron. There had been a payment in some corn made on one of the notes for the purchase money, by Tuggle, in the lifetime of Dunn.

The court held and adjudged that Mrs. Bayne as the widow of said William G. Dunn, deceased, was entitled to dower in the premises in question. To which decision and judgment the defendant, James C. Aaron, excepted.

FLOYD, for plaintiff in error.

CLARK & LAMAR, *contra*.

By the Court.—BENNING, J., delivering the opinion.

Was the widow of Dunn entitled to dower in the land? This is the question. The court below held that she was.

Dunn had sold the land to Tuggle, and given to Tuggle his bond with a condition to make Tuggle a title, when the purchase money should be paid. At Dunn's death, the greater part of this was still unpaid. After his death, this balance was paid to his administrator.

These things being so, the effect was to make Dunn hold the legal title to the land, as trustee, for Tuggle, or his assignee. And such a title is not subject to dower. "But upon the establishment of trusts, it became settled that trustees only held the legal estate for the benefit of the *cestui que trust*; and that the legal estate was not subject to any of the incumbrances of the trustees; to their specialty or judgment debts; to the dower of their widows, or the courtesy of their husbands." (1 Cruise's Dig. Tit. 12, ch. 4, sec. 2.) This position of Cruise, seems well supported by the decisions which he cites. (See Hill on

Trustees, 269, and the cases cited; 2, Sug. on Vend. & Pur. 215.)

We think, then, that the decision of the court below was erroneous. We think that the widow was not entitled to dower in the land.

Judgment Reversed.

BETHEA vs. PROTHRO.

The defendant, in an attachment, took issue on the attachment-affidavit; and, thereupon, moved for leave to open and conclude the case on the trial of the issue. The court overruled the motion, and there was a verdict for the plaintiff. The record did not show whether any evidence was introduced by the plaintiff, or indeed by either party.

Held, That the case made by the record, was not sufficient to entitle the defendant to a new trial.

Attachment. From Merriwether county. Decision by Judge BULL, at August Term, 1858.

George Prothro, by his attorneys Adams & Knight, sued out an attachment against William L. Bethea. The affidavit upon which the attachment issued, was made by John Knight, one of the firm of Adams & Knight, who swore that William L. Bethea was indebted to said Prothro one hundred and twenty-four dollars and three cents, according to the best of his knowledge and belief, and that said William L. Bethea absconds.

At the return Term of the attachment, defendant appeared and pleaded that he did not abscond as alleged by plaintiff in said affidavit, and upon this issue being submitted to a jury, counsel for defendant claimed the right

to open and conclude. The court held otherwise, and decided that plaintiff was entitled to the opening and conclusion, and to this decision counsel for the defendant excepted.

GEORGE A. HALL, for plaintiff in error.

ADAMS & KNIGHT, and B. H. HILL, *contra*.

By the Court.—BENNING, J., delivering the opinion.

It is true, we think, that on such an issue as this the defendant in the action has the right to open; and also, the right to conclude, provided the plaintiff introducing evidence. The plaintiff's affidavit makes out a *prima facie* case for him. It is also true, that the court in the present case refused the defendant's motion to be allowed to open and conclude. But does it thence follow that this court ought to grant a new trial of the issue? We think not. It may be that the effect of the plaintiff's having to open was of benefit to the defendant, for it may be that the plaintiff introduced the very evidence which the defendant would have introduced, if he had opened. If this was so, the effect of the plaintiff's having to open was of benefit to the defendant, rather than of injury—for it gave him the conclusion. What were the facts in this respect, does not appear in the record. There is nothing in the record to show that any evidence was introduced by either party; or to show that any address to the jury was made by either party. In a word, there is nothing in the record to show that the decision, even if wrong, worked any harm to the plaintiff in error. We may say, then, we think, that what we are allowed to see in this case, is not sufficient to justify us in granting a new trial.

Judgment affirmed.

YONGE vs. KINNEY.

- 1 Parol evidence is admissible to show it a rule of the Western and Atlantic Railroad, that persons are not to be on the platform when the cars are in motion.
- 2 A Railroad car running off the track, is *prima facie* evidence of negligence in some of the persons connected with the road.
- 3 If the person who is injured by the cars running off the track is himself culpable, the damages, if any, should not be as large as if he had been free from fault.

Case, from Cass county. Tried before Judge Trippe, at September Term, 1858.

This was action on the case brought by Martha Kinney, against the Superintendent of the Western and Atlantic Railroad, to recover damages for the killing of her son, John Choice Kinney, a minor, while a passenger on the cars of said road.

The jury found for the plaintiff three thousand nine hundred and sixteen dollars and sixty-two and two-third cents.

Whereupon the defendant moved for a new trial, which the court refused, and defendant excepted.

The facts of the case and the grounds of the motion for a new trial, are sufficiently stated in the opinion of the court.

D. A. WALKER, for plaintiff in error.

SHROPSHIRE and UNDERWOOD, *contra*.

By the Court.—BENNING, J., delivering the opinion.

Was the court right in overruling the motion for a new trial?

The first ground of the motion was as follows: "Because the court erred in ruling out the answer of John B. Fulton, to the following interrogatory: 'was there any rule relative to persons remaining on the inside of the cars, or on the platform, while the cars were in motion; and if so, what was it?'" said answer to which, and which was withheld from the jury, being in these words: "there was a rule forbidding all persons from being on the platform, when the cars were in motion."

The ground on which the exclusion of this evidence was put, as we infer from the argument, was, that if such a rule existed, there was better evidence of it, viz: written evidence of it in the "order books" of the Road. And what was relied on in support of the ground, was the 7th section of the act of 1850, "to provide for the collection and safe keeping of the revenues" of the road, "to punish those who" might "attempt to defraud the same, and for other purposes." (Cobb, 419) That section is as follows:

"The Governor and chief engineer be and they are hereby authorized and empowered, to adopt such rules and regulations for the government and management of said road, as they may deem conducive to the public interest, not inconsistent with the constitution and laws of this State, which shall be recorded from time to time, as they are adopted, in one or more order books to be kept for that purpose." Does this section sustain the ground? Does it show that the rule, if it existed, must have been on record in some "order book or book" of the road?

We think that it does not, and for two reasons. First, although the section says, that the "rules" which the Governor and chief engineer may adopt, shall be recorded in an order book or books, it does not say, that they must adopt any rules. It goes no further than to authorize them to adopt rules. And it might well be, that the rule in question existed at the date of the act, and that the

governor and chief engineer never adopted it, but left it as it was. In that case, it would be a good rule, even though not of record in any order book.

Secondly, we must doubt whether the intention was that the section should extend to rules of this kind; whether the intention was that the section should extend to any other rules than rules to operate on the officers, the agents and the employees of the road.

1st. We think, then, that the court erred in not receiving the answer to the question.

The second, the third, the fourth and the seventh grounds, may be passed without further notice than this mention of them. They merely impute error to the jury, in finding against the evidence, or against certain charges of the court; and, it is needless to consider them, as a new trial is to be granted on other grounds.

We see nothing meritorious in the fifth ground. The qualification added by the Court to the charge requested, was obviously proper.

The sixth ground was this charge: "that the running off of the track, by the train, was *prima facie* evidence of negligence on the part of the officers of the road."

We are not prepared to say that this charge was wrong.

2. It is certainly true, that in a large number of the cases in which a train or car runs off the track, there is no negligence in any of the persons connected with the road; but it is also true, as we think, that in a still larger number of the cases there is negligence in some of the persons connected with the road; and the chances are greater, that any particular case shall belong to the majority, than to the minority. Consequently, when there happens the case of a car running off the track, and nothing but such running off appears, the presumption must be that negligence in some person or persons connected with the road, was the cause why the car ran off. But this presumption will be a slight one, and easily rebutted;

the cases being in so large proportion, which are free from negligence.

The eighth ground was this charge: "that though the deceased may have been guilty of some negligence, this does not excuse the road, if they," [the jury] "believe, the officers were greatly more at fault than deceased."

We doubt whether this charge is precisely right. See *Davis vs. Western and Atlantic Railroad*, 18 Ga. 679. *Western and Atlantic Railroad vs. Wynn*, 19 Ga. 440. And for my own opinion as to the rule, see *Western and Atlantic Railroad vs. Wynn*, decided at Macon, June, 1858.

The ninth ground was, the charge: "that if the road would not bear a speed of thirty miles an hour, the speed should have been lessened so as to make it safe"—it being insisted, that there was no evidence to authorize the charge. And we can find none. Therefore, we must hold the ground a good one.

The tenth ground was, that the damages were excessive.

The damages were assessed at \$3,916 66. The suit was brought by the mother to recover the value of the services of her minor son. If he had lived, she would have been entitled to his services, so long as he remained a minor, and no longer. Obviously, then, his age at the time of his death, and the annual value of his services, are important elements in the question of what was the proper amount for the damages. What says the evidence on these two points!

There are two witnesses on the points, Montfort and Dunlap. Montfort says that the minor, when killed, was from sixteen to eighteen years old; and that his services were worth from \$25 to \$30 per month, and that their value would have increased at from ten to twenty-five, or fifty per cent. It is quite obvious, that we cannot get damages to the amount of \$3,916 66 out of this evidence.

Dunlap says that he moved to Cassville, on the 15th of January, 1839, and that about that time he became ac-

quainted with the minor; that from the age of his own son, and from conversations with the minor's mother, he thinks that the minor was about sixteen; that the minor was going to school when he first knew him. If he was, he must have been, we may assume, at least five years old. That was in 1839. So, we may conclude that he must have been born some time in 1834. He was killed in December, 1851. Consequently, he must at that time, according to this evidence, have been in his eighteenth year. The witness also says, that in 1845 he engaged the minor as an attendant about his store, at \$5 per month. It is very unlikely that such an engagement would have taken place before the minor had arrived at the age of eleven or twelve years. This, then, corroborates the other part of the witness's testimony. We may say, therefore, that according to the testimony of this witness, the minor was, when killed, at least seventeen years old.

This witness says that the minor's services were worth \$30 per month, or \$750 per year, (he had been drinking;) he also says, that a first rate clerk was worth \$1,000 per year, and that the minor was as good a clerk as he ever saw.

The incongruity in all this makes it worth very little as evidence. But say that it is trustworthy, and is to be construed most favorably for the verdict, what will be the result? Thirty dollars per month—even seven hundred and fifty dollars per year, will not, in four years, amount to \$3,916 66. But \$1,000 a year, for four years, will, and to something more. Say, then, that by the testimony of this witness the services of the minor were worth \$4,000, does it follow that the damages ought to be for that amount, or even for an amount equal to the verdict? It does, perhaps, unless there were some items to be set against the services. Were there any such items? We think that there were several. One—the expense of subsisting the minor. It is to be presumed that the witness

when he impliedly said that the minor was worth \$1,000 per year as a clerk, did not mean to say, he was worth this sum clear of the expense of his support. That expense would plainly be a considerable item.

Two—the chances of the minor's dying before arriving at the age of twenty-one. There is a way of estimating such chances. The insurance officers do it every day. How much these chances ought to reduce the damages, I am not prepared to say. I am sure, however, that they ought to reduce it quite appreciably.

Three—the fact that the minor was himself greatly to blame in the affair. He was an employee of the road. It is to be presumed, therefore, that he well knew that the platform on which he was, when killed, was a place of extra danger. In addition to this, he was told by the conductor that the place was one of danger, that he was violating a rule of the road, and that he must come inside the car. This he disregarded, and was killed; whilst another young man, who was with him, heeded it, went inside the car, and escaped unhurt. Ought he, or those standing in his right, under such circumstances, to recover full damages—to recover as much as if he had been guilty of no negligence himself? We think not. We will not undertake to say how much such conduct as this ought to reduce the recovery, but we will say that it ought to reduce it much.

It was, however, insisted that the mother was not to suffer for this misconduct of her minor child. The case was likened to that in which a man's slave is improperly taken on board a train, and is killed by it, through his own fault. But we do not see the analogy. It is not to be presumed that this minor was improperly on the train—was on it without his mother's consent. He was, and had been for some time, living away from his mother, apparently pretty much his own man. From this, we should

be authorized to infer a general consent on her part, to his traveling on the railroad.

And, then, what is more important and decisive, is that the mother is entitled to assert only the rights which the minor himself might have asserted, if he had been alive, and were the party suing for the injury. She is entitled to sue, as his "legal representative," and in no other way or right. And, as his legal representative, she is only entitled to sue if the circumstances are such that they would have entitled him to sue, had the injury stopped short of killing him. The nature of his conduct, then, enters as much into the case as if he himself were the party plaintiff. All this is by the act of 1850. (Cobb, 476.)

The conclusion, then, to which we come, is, that the verdict was too large, and that therefore this tenth ground was well founded.

That is the last ground.

The result is that we think that the court ought to have granted the motion for a new trial.

New trial granted.

DULIN vs. CALDWELL & CO.

A party is not entitled to an Injunction who shows that he has been negligent and careless in guarding his rights, and that if he has been subjected to loss it was because he had not attended to his interests in proper time.

In Equity, from Spalding county. Decision by Judge CABANISS, at Chambers, 17th November, 1858.

The facts of this case are sufficiently stated in the opinion pronounced by the court.

HAMMOND & SON, and FLOYD, for plaintiffs in error.

PEEPLER & CABANISS, and GIBSON, *contra*.

By the Court.—McDONALD J., delivering the opinion.

The error assigned in this case is on the refusal of the court below to order an injunction on the application of the plaintiff in error, enjoining the defendants from making an award made under a rule of reference, the judgment of the court, or from placing the same on the minutes, or from proceeding further with it until the further order of the court. The award was the *finale* of a litigation which had been pending for some time between the parties, growing out of transactions in cotton, and the refusal of the defendants to comply with certain alleged agreements, to furnish funds to plaintiff to lay out in cotton. The plaintiff filed a bill in chancery against the defendants for an account, &c., amended it three different times and filed a supplemental bill also. The defendants answered the original bill, and the first and second amendments and the supplemental bill, and John Caldwell, one of the defendants, answered the third amendment under an order of the court.

At the last May Term of the superior court of Spalding county, the cause was referred under a rule of court, the parties consenting thereto.

By the first and second amendments, the plaintiff prayed that the defendants might set forth an account of all the cotton he had shipped to them prior to 1850 on account of William H. White and others, and in answer to the first amendment, the plaintiff alleges that the defendants fraudulently refused to set forth the account, saying that from lapse of time they were unable to do so.

It was alleged further by the plaintiff, that the defendants, in answer to the original bill, said they were ready, at all times, to furnish him with copies of his accounts; that at the time of answering the original bill they had the books of account and plaintiff inferred from their refusal to set forth the account in their answers to the first and second amendments to that bill, that from some cause they were not in existence; that since the submission of the cause as aforesaid it has come to his knowledge, that the defendants have, all the time, had the books. The plaintiff further alleges, that notwithstanding the bill was exhibited for an account, John Caldwell put in his answer to the original bill, and to the first and second amendments, without referring to the books, which was unknown to the plaintiff until after he had agreed to the reference of the cause. The plaintiff sets forth, further, that the answers to the original bill and first and second amendments, contain several inaccuracies which John Caldwell refused to admit until the cause was submitted; that none of these things came to plaintiff's knowledge until the arbitrators had organized, and that it was by reason of their fraudulent concealment of them from him that he agreed to submit the cause to referees.

The plaintiff's bill further states that the arbitrators have made an award containing palpable errors and mistakes of both law and fact, to the prejudice of the plaintiff; that he could now compel them to produce the books and answer fully from them, and that under the direction of the court he could recover twenty-five hundred dollars. The plaintiff repeats, that for the foregoing reasons he entered into the rule of reference, and that defendants could have answered more fully if they had desired to do so. The bill further alleges that after the arbitration was organized, he was for the first time informed by the solicitors of the defendants that the defendant, Caldwell, had then the possession of the books, which in their an-

swer they had denied being able to control, or set out a transcript from. He insists that it was by fraud and concealment of facts that he was induced to agree to the submission of the cause.

Under these several allegations the court refused to order the injunction prayed for.

We concur with the court below in the opinion that the injunction ought not to have been ordered. The answers of the defendants were in court, and the plaintiff ought to have acquainted himself with their contents, and if they were not full answers to his bill and amendments, he ought to have excepted to them. The chancellor would have compelled the annexation of the entire account called for by plaintiff, and would not have been satisfied with loose inferences from careless and insufficient answers. It shows great laches on the part of the plaintiff not to have known that John Caldwell did not in his answers refer to the books of account at all. A party who applies to a court of chancery for the aid of its extraordinary powers must show himself to have been vigilant and diligent.

But the plaintiff voluntarily agreed to this reference, and if he did it on account of his ignorance of the contents of the defendants' answers, and of their insufficiency, it was his own fault that he did not know them. He was informed, at the time of the arbitration, that the books were present in the possession of John Caldwell, who was in attendance. He did not ask their production, nor did he request a postponement of the arbitration that he might have an opportunity to examine them. On no principle can he under the allegations in this application, be allowed an injunction. A party who asks the assistance of a court of equity, must show that he has been watchful of his rights and interests, and that he has not lost them by his own remissness and negligence.

Judgment affirmed.

CHEROKEE INS. & BANKING CO. vs. JUSTICES
OF WHITFIELD COUNTY.

There is no law in this State, authorizing the inferior courts of the respective counties, to levy an extra tax for county purposes, upon the capital stock of a bank, located within their limits.

Mandamus, from Whitfield county. Decision by Judge TRIPPE, at October Term, 1858.

This was an application by the Cherokee Insurance & Banking Company for a mandamus to be directed to the inferior court of Whitfield county, to compel said court to pass an order requiring the treasurer of said county to refund to relator the sum of two hundred and fifty-three dollars and thirteen cents, assessed as a tax for county purposes upon the capital stock of said company, and paid into the treasury of said county. The said sum was the amount paid by said company, for the years 1855 and 1856.

Upon hearing the answer of respondents, the court refused to grant the mandamus, and discharged the rule *nisi*, holding that said company was liable to pay a county tax upon its capital stock. To which decision counsel for relator excepted.

WM. T. MOORE, for plaintiff in error.

C. D. McCUTCHIN, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

Ought the Judge to have granted a peremptory mandamus in this case? The answer to this question depends upon the legality of the tax paid by the Bank in 1855-'6.

Had the inferior court of Whitfield county, authority of law to assess and collect a tax on the capital stock of this Bank actually paid in for county purposes? If it had, it must be under a power delegated to them by the legislature for that purpose. The act of 1821, (Cobb 184) confers a general power upon the inferior court to levy "taxes for county purposes, upon the *inhabitants* of any county in which said justices may reside." Is this Bank, as to its *capital stock*, an "inhabitant" of Whitfield county? That a corporation may be an inhabitant of a county, for certain purposes, is admitted. Our judgment, however, is, that a bank, as to its capital stock, is not an inhabitant of any particular county, for the purposes of taxation; and although this act of 1821, has been in force for near forty years, it has never received this construction. That of itself, creates a strong presumption that the power claimed is not conferred by it. It is conceded that the general tax act of 1851-'2, does not give the right to impose this tax. It cannot be derived from the act of 1817, (Cobb 1062,) imposing a special tax upon banks, or from any other statute.

The stockholders of this, and every other bank, are usually scattered over the State. Why should an extra tax be levied on their stock for the benefit of Whitfield county? It would be more equitable to levy it on each stockholder to the amount of his shares; yet they are specifically exempted by the act of 1851-'2.

This, and all other banks, pay to the State a heavy tax upon their capital; yet it is paid directly to the treasurer, without the intervention of county officers. No mode has been prescribed for levying and collecting such a tax by the county; and until the Legislature see fit to speak out plainly upon the subject, we are unwilling to sanction the exercise of so doubtful a power, to say the least of it.

Judgment reversed.

GRIMES vs. RAGLAND.

A residence upon, and the actual possession and occupation of one of two tracts of land conveyed to the defendant in the same deed, is not such a constructive possession of the other tract of which there is no actual occupation, as if continued long enough, will bar an action by the rightful owner under the statute of limitations.

Ejectment and motion for a new trial, in Paulding Superior court. Decided by Judge HAMMOND, August Term, 1858.

This was an action in the ejectment form by William R. Grimes, Benjamin H. Swearengin and Wilson Lumpkin, lessors, against W. Ragland, tenant in possession for lot of land No. 330, in the second district and third section of said county.

Plaintiff proved title to the lot in controversy, 330, founded upon a grant from the State to Grimes, then a deed from Grimes to Swearengin, and a deed from Swearengin to Lumpkin. Proved that defendant was in possession, and closed.

Defendant offered and read in evidence a deed from Elijah Ragsdale, to lots No. 330 and 331, dated 20th January, 1842, and proved that he went into possession under the deed soon after its date—that the lots were adjoining—that is, that his residence and improvements were on lot number 331, but there were no improvements on lot 330, until about 1852 or 1853, and no acts of ownership and possession except cutting timber, &c. The question in the case was, whether a possession of, and residence on, one lot of land, under a deed of conveyance of said lot with another, forming an entire settlement or farm, but without actual occupation or improve-

ment of that other, will constitute adverse possession as to the lot not occupied or in cultivation.

The court charged the jury that, "if defendant purchased and received a deed conveying the lot in dispute, together with some other lot, and he went into the actual possession of the other lot, and exercised acts of ownership over both lots as one tract or parcel, he was in possession of the whole, though he had not cleared or made any improvements on the lot in dispute, they being adjoining lots; and this possession would be protected to the extent of the boundary called for by the deed under which he held and claimed."

To which charge plaintiff excepted. The jury found for the defendant, and plaintiff moved for a new trial, which was refused, and he excepted, assigning as error said refusal.

CHISOLM & WADDELL, and FIELDER & BROYLES, for plaintiff in error.

IRVIN & LESTER, *contra*.

By the Court.—McDONALD, J., delivering the opinion.

This was an action of ejectment in the county of Paulding for the recovery of a tract of land known as No. 330, in the second district of the third section of originally, Cherokee county. The jury rendered a verdict for the defendant, whereupon the plaintiff moved for a new trial on three grounds. The first ground was, that one of the special jury who tried the cause was related to the defendant, Sanders W. Ragsdale, within the levitical degress of consanguinity, and was, therefore, not a competent juror to try the cause, which fact was unknown to the plaintiff until said cause had been submitted to the jury, and testimony introduced. This objection comes too late after a trial and verdict. Such objections to jurors may be

easily ascertained by the use of a little diligence. The jurors themselves may be enquired of, if there are kinsmen of either party on the panel.

The next ground is the important one in the motion, and the point is easily extracted from the request of the court to charge the jury, and the charge of the court as given to the jury, viz: whether a residence upon, and the actual possession and occupation of, one of two tracts of land conveyed to the defendant in the same deed, is such a constructive possession of the other tract, of which there is no actual occupation, as if continued long enough, will bar an action by the rightful owner under the statute of limitations. The court below charged the jury that it would. The defendant resided on the tract of land adjoining that sued for. He claimed both tracts of land under one and the same deed. He had a hog pen on the land in dispute, and had rails split and logs cut on it, but stated that he was not in possession of it, except that he had paid taxes for it.

By our lottery system, lands are divided into tracts by number and district, and ordinarily, there can be but one grantee or one set of grantees, as when the grant is to orphans, so that a careful and guarded purchaser can find but little difficulty in ascertaining whether he has the rightful title. This consideration alone should lead courts to adhere to the strictest rules of construction in favor of the true owner. We have, in the judgment we pronounce, laid some stress upon this matter, though it was not necessary in order to sustain the case of the plaintiff in error. It is laid down in *Adams on Ejectment*, 592, that where a large tract of land is divided into lots, the possession of one lot adversely will not create a constructive adverse possession of the other parts of the tract, although claimed by the defendant under the same paper title. The author cites in support of the principle the case of *Johnson ex dem. Ten, Eyck and wife vs. Richards*, 6 Cowen, 623.

“The law deems every man to be in the legal seizin and possession of land, to which he has a perfect right and complete title; this seizin and possession is co-extensive with his right, and continues until he is ousted thereof by an *actual* adverse possession.” United States vs. Arredondo and others, 6 Peters’ Rep., 743. This court has held repeatedly, that the owner of land in this State, having the true title, is in constructive possession of his wild lands wherever situated, and that a possession to be adverse to him so as to create a bar under the statute of limitations, must be open, notorious and continued. That is unquestionably the true and sensible rule. One reason which is assigned why a possession is held to be adverse to the rightful owner of land, is his presumed acquiescence in the right of the possessor. There can be no acquiescence without notice, and there can be no notice if the possession has not been *open, visible*, notorious and continued. Hence, the reason of the rule, that to create an adverse possession it must be open and continued. If it be not *continued*, another presumption comes to the aid of the true owner, and every legal presumption is in his favor, and that is, that the possessor, by relinquishing the actual possession acknowledges the superior title of the true owner. By his abandonment of the possession, the constructive possession of the true owner extends immediately to the premises, and it requires a new ouster or disseizin, to fix a starting point for the statute. On this point Ch. J. Shaw said, in the case of Blood vs. Wood, 1 Met. Rep. (Mass.) 528, “one point seems to be well settled, which is, that very strong acts of exclusive possession, such as building, inclosing or cultivating and that for a long time, and openly and notoriously, are necessary in order to create an actual ouster of the true owner, who has no notice of such acts.” In regard to the premises now in dispute, if the owner had passed the land and examined it, at any time prior to the clearing of the field

in 1852 or 1853, he would have had no notice whatever of an adverse claimant, for the hog-pen, which, according to the usage of the country, is no evidence of ownership of the land on which it is put, the splitting of rails or the cutting of logs, which are the ordinary works of trespassers residing on contiguous lands, would not have advertised him in the absence of an actual occupant.

But again, here are two persons claiming title to the land. One has the actual, rightful, *bona fide* title; the other has a spurious title. Neither of them has the actual possession. In whom is the constructive possession? Surely in him who has the rightful *bona fide* title.

For the reasons here assigned, we think that the court erred in refusing to charge the jury as requested by plaintiff's counsel, and in giving the charge he did to the jury, and on that ground he ought to have granted a new trial.

Judgment reversed.

JOHNSON, SMITH & CO., vs. THURMOND AND TERRY.

Judgment against a defendant and his security on *ca. sa.* bond, after the defendant has been discharged under the Honest debtor's Act to which proceedings the plaintiffs were parties, the judgment taken without his consent, ought to be set aside.

Illegality, from Fulton county. Decision by Judge BULL, at October Term, 1858.

Plaintiffs in error sued out a *capias ad satisfaciendum*, against William H. Thurmond, for forty dollars, besides interest and cost, dated 2d September, 1856, returnable

to the succeeding term of the superior court of Fulton county, to be held on the first Monday in October next, thereafter. The sheriff arrested defendant upon this *ca. sa.*, on the 12th September, 1856, who entered into bond with Stephen Terry, security, to appear at the next superior court to be held in and for said county on the first Monday in October next, after the date of said bond, "then and there to stand to and abide by such proceedings as may be had by the court in relation to his taking the benefit of the act of 1823, entitled "an act for the Relief of Honest Debtors," &c.

At October Term, 1857, Thurmond having failed to appear, plaintiff entered judgment upon this bond against Thurmond and Terry, and sued out a *fi. fa.*, which was levied upon a lot in the city of Atlanta, belonging to Terry, who filed his affidavit of illegality, alleging that said *fi. fa.* was proceeding illegally against him, in this, that his principal, Thurmond, was arrested by virtue of a *capias ad satisfaciendum*, at the suit of R. E. Mangum & Co., on the 27th day of May, 1856, and that under the provisions of the Honest Debtor's Act of 1823, he was discharged at Fulton Inferior Court, June Term, 1857, under proceedings had in that case, and that the plaintiffs Johnson, Smith & Co., were made parties to said proceedings by notice duly served upon them as provided by law. And he submits that this operated as a legal discharge of his principal from his arrest under the *ca. sa.* issued by plaintiffs, and that the judgment afterwards entered by them against Thurmond and affiant, as his security upon the bond for his appearance, and upon which judgment his *fi. fa.* issued, is void, and that said *fi. fa.* is proceeding illegally.

It further appeared that Combs & Co., had also sued out a *ca. sa.* against Thurmond, who was arrested thereon 14th March, 1856, and Terry became his security and it was agreed that the judgment in the case of Johnson,

Smith & Co., be made the judgment in that case likewise.

A motion was also submitted by counsel for Thurmond and Terry, that the judgment in the case upon which the *fi. fa.* issued be set aside and declared void, on the grounds set out in the affidavit of illegality above stated.

After argument, the court sustained the illegality, and set aside the *fi. fa.*, and declared the judgment upon which it was founded null and void. And plaintiffs excepted.

T. L. COOPER and COLLIER, for plaintiffs in error.

GREEN B. HAYGOOD, *contra*.

By the Court.—McDONALD, J., delivering the opinion.

The court annulled the judgment in this case against the surety on the *ca. sa.* bond. The plaintiffs had been notified of the application of the defendant, Thurmond, to take the benefit of the act for the relief of honest debtors, and were bound by the judgment of the court rendered in his favor on that application. The majority of this court are of the opinion that that judgment operated as a bar against the further proceeding of the plaintiffs in the *ca. sa.* bond, without plea or proof, and that on that ground the judgment of the court below ought to be affirmed. I incline to a different opinion. The arrest of the defendant by the plaintiffs was a distinct proceeding, which ought to have been met by him as in all other cases. He ought to have appeared and proved his discharge, which would have arrested further proceedings on the bond.

The defense would, no doubt, have been effectual and complete, if he had then made a suggestion and proof of his discharge. But, because he did not then make it, from a misapprehension of the necessity of making it, is he now concluded by the judgment so effectually that he cannot move to set it aside? The record does not show

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the view taken of the case by the presiding judge in the court below. He has set aside a judgment rendered against the defendant most unjustly in his own court. Ought this court to disturb his judgment? The defendants unquestionably knew all the facts of their case, and there is as little question that they acted under a mistake of the law, in the view that I take of it. If they acted under the impression that the discharge of Thurmond under the honest debtor's act, put a stop to proceedings against him in all other cases, a court of chancery would take jurisdiction of the cause; and if a court of chancery would do it, the same court in which the judgment was rendered ought certainly to take cognizance of it and rescind its judgment which it would be against conscience for it to execute. Story's Eq. Jur. § 120. Taking either view of the case, then, the judgment of the court below must be affirmed.

Judgment affirmed.

LONG vs. YOUNG.

1. The statute of limitations does not run against the true owner of land, in favor of the tenant in possession while he disclaims title in himself, and is seeking the true owner with the avowed purpose of purchasing of him; and it is immaterial whether this disclaimer and recognition of title in another, be made before or after the seven years' bar has attached.
2. Cutting fire wood and rail timber on land are not such acts of ownership as to constitute adverse possession.

Ejectment, from Union county. Tried before Judge RICE, at May Term, 1858.

This was an action of ejectment brought by John Doe, *ex dem.* George H. Young, against Richard Roe, casual ejector, and Charles Long, tenant in possession, for the recovery of lot of land number 90, in the eleventh district and first section of Union county.

The defendant relied upon the statute of limitations.

Evidence for Plaintiff.

Gabriel Wooten proved that Long was in the possession of the lot of land sued for at the commencement of the suit, and had been in possession six or seven years.

Tobias Wooten, proved that Long was in possession—describes the location of the lot and improvements thereon—adjoins lot No. 91, and most of the improvements are on No. 91. When Long went into possession there were about three acres cleared on No. 90. Witness cultivated it the year before Long went on it—there are now some twenty or twenty-five acres cleared on the lot—Long cleared it—worth three dollars per acre to clear land. Long commenced clearing the last of 1850. Thinks the land worth twenty-five dollars per year for rent.

Plaintiff then offered in evidence the grant from the State to his lessor, George H. Young, dated 19th December, 1842, and closed.

Evidence for Defendant.

John S. Waters, testified that he bought the lot in dispute, (No. 90,) from Charles Stargel, and went into possession in the year 1838 and remained on it ten years, and then let Long have it—there had been about three acres of the lot cleared and in cultivation some years previously—that he cultivated the land some ten years continuously—the unimproved portion of the lot he claimed and used as his own by getting rail timber, fire wood, &c., and exercised acts of ownership over it openly and notoriously, as persons usually do over their uncultivated

Long vs. Young.

lands similarly situated. He sold it to Long, who went into possession in 1850. Witness moved off in 1848 or 1849, but left his son on the lot until Long entered in 1850.

Cross-Examined.—He bought the *improvements* on said lot, and he sold the *improvements* to Long—when he bought from Stargel, he bought the improvements and he sold the same to Long—the improvements were mainly on the adjoining lot, but extended over to this lot, and he cultivated a strip of about twenty-five yards wide at the widest place, and about seventy-five yards long, on lot 90. Does not know when Long went on the land—witness left his son on the place, who made one crop on it. Does not know, of his own knowledge, that Long ever went on the land. Witness claimed and cultivated said land ten years and then sold it to Long—he purchased *only* the improvements, but claimed title to the whole. He sold the *improvements* to Long and he supposed Long lived on the land some seven or eight years.

James Gurley, Sr., testified that he knew lot of land in dispute, (No. 90.) John Waters was on it some eight or ten years—when Waters left it Long went on it—when Waters lived on it, there were some two or three acres cleared—Long cleared some ten acres on the lot two or three years ago, and lived on it about three years afterwards, before he moved away in March, 1854.

Cross-Examined.—Long left last March was a year ago. When Long left he sold to Charles Davis—the land has been in cultivation every year, so far as witness knows—did not see it every year—does not know whether Waters was on it every year or not—was there every time witness passed or saw the place—did not see it every year.

Defendant closed, and plaintiff introduced in reply,

John Butt, who testified that he had two conversations with Long in 1855 or 1856, about this lot of land. Long told him that he bought the improvements on the lot

from Waters, and he had sold his interest in the land to Charles Davis—that they had been sued, and Long wanted to know whether he must come back and attend to the suit, and said he had only given a quit claim deed to said land—Long also said that the owner of the lot had never been to see it—that he did not know who the owner was—that he had applied to Col. Varnum to hunt him up and to buy the land for him.

Counsel for defendant objected to the sayings of Long, after he had sold to Davis, and had gone out of the possession of the premises—objection overruled by the court.

Cross-Examined.—Did not know whether Long said that he had sold his interest in the land or the improvements. Long said that the owner had not been there, and that he would like to purchase the land if he could find the owner, and that he had asked Col. Varnum to purchase it from the owner for him. This conversation occurred a short time before Long moved to Alabama.

Defendant objected to the sayings or admissions of Long, made after he had sold the land and was out of possession, which objection was overruled by the court, and the same were allowed to go to the jury.

The court charged the jury, amongst other things, that the defendant must not only show an actual continuous possession of the premises, but his possession must also be adverse to the title of the true owner. A possession with an assertion of ownership is adverse possession—the occupancy must be with the intent to claim the fee as against the true owner. The statute of limitations does not run against the owner in favor of one in possession, while he disclaims title, and any acknowledgement that he is not the owner, or recognition of the legal title held by another, amounts to a disclaimer; and the sayings and declarations made by Long as to the land being owned by another, and his wish and effort to purchase it, if

believed to have been made, amount to a disclaimer of title in himself.

That when one goes into possession of land under a deed of conveyance, his possession extends to the boundaries called for or mentioned in his deed, but when he goes in without paper title, then his possession is confined to his actual occupation. The defendant then, relies on mere naked possession, and since the act of 22nd January, 1852, possession alone without title or color of title does not constitute adverse possession, but such possession is held and deemed subordinate to the legal title. Previous to the passage of the above mentioned act, actual possession with a claim of right continued for seven years, constituted a good statutory title—a title sufficient to defeat the recovery by the person having the legal title. If the defendant has proved that a portion of the lot in question had been inclosed and cultivated seven years or more, prior to the 22nd January, 1852, and has also proved that he, or those under whom he claims, had a continuous adverse possession with a claim of right, (that is, claiming the fee,) then he is intitled to that portion, and the plaintiff cannot recover that part. But as to so much as was not thus enclosed and cultivated, the court charged that defendant had no title, and that cutting fire wood and rail timber on the land were not such acts of ownership as constituted an adverse claim or possession; and that the statute of limitations did not commence to run in favor of the tenant in possession, until the grant from the State issued, which, in this case was the 19th December, 1842.

Defendant requested the court to charge the jury, that if Long or any other person in possession, did not make any disclaimer of title or acknowledgement of ownership in another, until after the expiration of seven years, then such disclaimer or acknowledgement could not affect a

title already accrued under the statute of limitations. Which charge the court refused to give.

To all of which charge and refusal to charge defendant excepted and assigned the same as error.

The jury found for the plaintiff, and defendant moved for a new trial, on the ground :

1st. Because the verdict was contrary to evidence and the weight of evidence.

2nd. Because the court erred in its charge to the jury, and its refusal to charge as requested.

The court refused the motion for a new trial, and counsel for defendant excepted and assigned the same as error.

FRANCIS, for plaintiff in error.

BROWN, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

It is not disputed but that the title to the lot of land sued for in this case, is in the plaintiff. The defendant seeks to protect himself against a recovery, under the plea of the statute of limitations. The lot in dispute is No. 90 in the 11th district and 1st section. It adjoins No. 91. There was an improvement on 91 which was bought by the predecessor of Long, and sold to him, and by him to Davis. They extended their clearing over into 90. None of them ever pretended to own or convey the fee of either of the lots, but simply the *improvements* thereon ; which, as we understand the term, amounts to nothing more than a squatter claim, which is good until the tenant in fee asserts his paramount right.

There never was, therefore, an adverse holding of the premises in dispute in the legal meaning of that phrase. Long, the defendant, stated distinctly to the witness Butt, that the owner of the land had never come to see it, and that he did not know who the owner was. That he had

bought the *improvements* from Waters; and that he requested Col. Varnum to hunt up the owner and purchase the land for him. That he would like to buy the land, if he could find the owner.

It is objected that this disclaimer of title was made after the bar of seven years had attached. What of that? It shows he never owned the land or claimed it as his own. And this doctrine we decided at Macon recently.

It is further objected that Long had sold his interest to Davis, when he made this disclaimer. There is much confusion in the testimony upon this point, to-wit: whether he had left the land or not when the disclaimer was made. Be that as it may: this action is brought against Long, and no body else, and he is bound by the disclaimer. The court submitted the question to the jury whether the disclaimer was made while Long was in possession of the land.

Finding no error in the decision of the court as it respects this disclaimer, and believing that his charge to the jury was a correct exposition of the law upon all the points embraced in it, we affirm generally the judgment complained of.

Judgment affirmed.

FLANEGAN vs. GARRISON AND WIFE.

- 1 If the defendant claims title under the complainant, he has the right to show that title was in the complainant, if he can.
- 2 A guardian had a bastard child by his ward, and she agreed with him to settle a part of her property on the child. *Held*, that the agreement was not one which was void *per se*.

In Equity, from Polk superior court. Tried before Judge HAMMOND, at April Term, 1858.

This was a bill in equity filed by Baxter M. Garrison and Dorcas M., his wife, against Joel L. Flanagan, for an account and settlement of the estate of Mrs. Garrison, formerly Dorcas M. Sausing, former ward of defendant.

The bill alleges that Benj. Sausing, deceased, father of said Dorcas, died in the year 1848; that defendant became her guardian, she being a minor, and received from the administrator of her father her distributive share of his estate; besides a negro woman named Emiline belonging to her.

The prayer of the bill is for an account of said estate, and the profits and hire of the woman Emiline, &c.

Defendant in his answer admits that he was the guardian of Mrs. Garrison, during her minority; but he states that she had an illegitimate child, of which defendant was father, and by agreement with her, ratified and confirmed by her after she became of age, he sold the woman Emiline and children for \$1500, one half of which was to belong to said illegitimate child, and the other half to said Dorcas; that said woman was bequeathed to her by her father and to the issue of her body; and that said illegitimate is the only child of said Dorcas, nor is she likely to have any other. The answer submits that defendant holds said sum of \$1500 under said agreement, one half for his illegitimate son, for whom he has been appointed guardian; the other half he is ready and willing to account for and pay over to complainants, &c.

The case was heard upon the bill and answer and proofs. After complainants closed, defendant offered in evidence the last will and testament of Benj. Sausing, deceased, to show the nature of complainant's title to the negro woman, and the proceeds of her sale. Complainants objected to this

testimony as irrelevant and illegal. The court sustained the objection, and defendant excepted.

Defendant then proposed to prove the agreement between himself and said Dorcas, made while she was under the age of twenty-one years, but ratified after she attained majority, in relation to the woman Emiline and the proceeds of her sale.

Complainants objected to this evidence. The court sustained the objection and excluded the testimony, on the ground that a contract of that kind between guardian and ward was void *per se*; and that no subsequent ratification or confirmation would give it force or validity. To which ruling defendant excepted.

The jury found for complainants twenty-four hundred and fifty-eight dollars.

Whereupon counsel for defendant moved for a new trial, on the grounds of error in the aforesaid decisions and charge of the court, and that the verdict was contrary to law and the evidence.

The court overruled the motion for a new trial, and defendant excepted.

FIELDER & BROYLES and IRWIN & LESTER, for plaintiff in error.

CHISOLM & WADDEL and H. BUCHANAN, *contra*.

By the Court.—BENNING, J., delivering the opinion.

Was the court right in excluding from the jury the will of Benjamin Sausing? We think not. The will showed title in Dorcas Sausing, one of the complainants, she having become the wife of Baxter M. Garrison, the other complainant; and Flanagan claimed under her. It was, therefore, a part of the case he had to make out, to show title in her.

Was the court right in rejecting the evidence offered by Flanegan, to prove the agreement between him and Dorcas Sausing, by which she was to settle one half of her property that was in dispute, (provided he recovered it for her,) on her son, Joel, of whom Flanegan was the illegitimate father; and to prove that she ratified the agreement two years after she became twenty-one years old? We think not. The ground upon which the rejection of this evidence was put was, that "a contract of that nature, 'made between guardian and ward,' was "void *per se*; and that no subsequent contract or agreement could give it validity."

Was the court right in this view? We think not. It is a question, whether any contract between guardian and ward is, *per se*, void. What law is there that puts guardian and ward, even as it respects each other, among the persons who are incompetent to contract? But certainly it is not true, that there can be no valid contracts between them. And if there can be any, why not this be one? This was a contract which conferred no benefit on the guardian, the mother being able to support the illegitimate child; a contract by which the ward, this mother, made a provision for her own child, and thereby performed a double duty; a duty to the child and to the public. She was bound to support the child, and the contract may be considered as merely making provision for his support. We cannot regard such a contract as this void, *per se*.

It is useless to consider the other grounds.

New trial granted.

WALKER vs. WALKER.

1. The parties to an arbitration are entitled to reasonable notice of the sittings of the umpire.
2. And if one of the parties does not receive such notice, and the umpire and arbitrators hear the other party, and the umpirage is in favor of the latter, and he insist upon the umpirage, the want of such notice will be a fraud in him, at least, if not in the arbitrators and umpire, on the former party.
5. When an award is good in part and bad in part, if the bad part is separable from the good, and is not a condition of the good and is favorable to the party insisting upon the validity of the good part, the good part will be upheld, unless there is in the way some clause in the submission.
4. If in such a case the award be on a condition, yet if the condition be confined to the bad part, the effect of the condition will be confined to that part.
5. If in such a case the award be incomplete, yet if the incompleteness be as to matters belonging to the void part, the effect of the incompleteness will be confined to that part.

Arbitration and Award, in Upson superior court. Decision by Judge CABANISS, at May adjourned Term, 1858.

James S. Walker and others, children and heirs at law of William W. Walker, deceased, filed their bill in equity against Nathaniel F. Walker, as executor of Allen M. Walker, deceased, and in his own right, for an account and settlement of the estate of their father which came into the hands of said Allen M. Walker, as administrator of said William W. Walker, deceased, and who was also the guardian of complainants, during their minority.

Pending this cause in the superior court of Upson county, the parties entered into the following agreement to submit the case to arbitration; viz :

Whereas, a matter of controversy is pending in equity in Upson superior court, between James S. Walker, Free-

man Walker and Frances C. Walker, complainants, and Nathaniel F. Walker, in his individual capacity, and also as the executor of the nuncupative will of Allen M. Walker, deceased, though not yet made a party defendant, which involves questions of law and fact; the latter to be ascertained by lengthy calculations, and the parties believing that the same can be settled more correctly by submitting them to arbitrators chosen by the parties, than by submitting said cause to a jury, do hereby enter into the following agreement: The parties agree to submit the case made by the bill, answer and replication filed, in said cause, in its totality, to two arbitrators to be chosen by the parties, and that the parties shall have the right to adduce all legal proofs pertinent to all the issues made as though the cause were on trial before a court and jury.

The pleadings in said case if not complete, shall be made so with all convenient dispatch, and if the defendant should desire to file a cross bill he shall do so with as little delay as possible, and the complainants shall as soon as practicable file their answer thereto, and the same shall go to the arbitrators, with the other pleadings in the cause.

The parties agree that Thomas P. Stubbs, Esq., shall be the arbitrator selected by the complainants, and Washington Poe, Esq., shall serve, as the arbitrator chosen by defendant, and that these two shall have the power of selecting an umpire to decide all questions of law and fact, upon which they may not be able to agree. The parties hereby further agree that Joel Mathews, Esq., of the county of Upson, shall act as commissioner, to take testimony in said cause, to be used before the arbitrators. The party desiring to take the testimony of a witness shall make out written interrogatories and file the same, with the commissioner giving the adverse party notice thereof, together with a copy of said interrogatories, (unless copy and notice should be waived) on the day of filing.

Notice shall also be given of the time and place of the examination of the witnesses, which shall be at least ten days from the time of filing the interrogatories with the commissioner.

Each party shall be allowed by himself or attorney to be present at the execution of the interrogatories, and shall be allowed to suggest other questions to the commissioner. The answers shall be sworn to and taken down in writing by the commissioner, signed by the witnesses and attested by the commissioner, and the whole being sealed up shall be directed to the arbitrators, by whom they shall be opened under such rules as they may adopt.

The arbitrators shall sit at Thomaston, Georgia, after giving the parties ten days notice of the time of such meeting, and shall proceed to try said cause upon the evidence submitted to them. There shall be no continuance except for providential cause, except in the sound discretion of the arbitrators. The rules of practice as to argument of counsel, which obtain in the courts shall be observed.

The parties having closed, the arbitrators, assisted if need be, by an umpire chosen as aforesaid, shall proceed to make an award within thirty days after the cause is finally submitted to them, which shall be binding except for fraud.

The parties agree that the award shall be entered upon the minutes of Upson superior court, and at the November Term, 1856, if possible, and that judgment shall be entered up for the sum awarded, and that the costs in said cause shall be paid under and according to said award.

When the agreement shall be signed by the parties, and the arbitrators shall have accepted the trust, the power hereby conferred upon them, shall be considered irrevocable. And if after their acceptance, either arbitrator, from providential cause, be unable to discharge the duties

of the trust, the party whose arbitrator shall become thus unable, shall within twenty days from the happening of such providential cause, choose another arbitrator to act in his place, and in default of such choice the remaining arbitrator shall have the power to fill such vacancy. The parties shall proceed to make up the testimony, and to prepare the case for trial at as early a day as practicable, and shall by the twentieth day of October next notify the arbitrators of their readiness to proceed with the trial, (unless providentially hindered,) and the parties and arbitrators shall so direct the case as to have the award ready to be entered on the minutes of Upson superior court at the term heretofore specified, if possible.

The bill filed in said cause was filed by complainants against Jesse L. Owen as the executor of the estate of Allen M. Walker, deceased, and the said Nathaniel F. Walker, and the said Jesse L. having departed this life, and the said Nathaniel F. having been qualified as executor of said estate, but not yet made a party, it is agreed by the parties that the said Nathaniel F. shall be bound in his representative capacity by said award as though he had been made a party to said bill. To be signed before binding, by the parties themselves.

August 16th, 1856.

O. C. GIBSON, Def'ts Attorney.

J. M. SMITH, Comp's Attorney.

Signed by the parties 9th Sept. 1856.

Attest,
J. M. SMITH.

JAMES S. WALKER.
FREEMAN WALKER.
FANNIE C. WALKER.
N. F. WALKER, Ex'r.
N. F. WALKER.

Under this submission the arbitrators made the following award :

MACON, GA., January 7th, 1857.

We, the arbitrators to whom was referred the matter

of difference between the parties set forth in the above submission, after hearing all the testimony on both sides, and after argument of counsel being fully had, find and award as follows, to-wit:

1. We find that no sufficient proof has been submitted to us, to authorize or justify us in charging defendant with the value of the two lots of land, lying somewhere in south-western Georgia, (the numbers and other description not given,) and the proof as to the value, being, in our opinion, vague and indefinite; therefore as to said two lots of land, we find and award in favor of defendant.

2. As to the hire of Hannah and her children, that question or matter having, on motion of defendant's counsel, been stricken out from the bill, we ratify and re-affirm our judgment as to said Hannah and her children, and now refer to the same.

As to all other matters submitted to us, (except as to the amount of money on hand at the death of William W. Walker, and as to which, we have called in the Hon. Eugenius A. Nisbet, as umpire,) we find and award as follows:

1st. We find and award in favor of the complainant, James S. Walker, the sum of (\$20,629 19,) twenty thousand six hundred and twenty-nine dollars and nineteen cents, with interest thereon from the first day of January, 1857.

2d. We find in favor of the complainant, Nathaniel Freeman Walker the sum of (\$20,585 48,) twenty thousand five hundred and eighty-five dollars and forty-eight cents, with interest thereon from the first day of January, 1857.

3d. We find and award in favor of complainant, Frances Charity Walker, (who sues by her guardian, Thomas W. Goode,) the sum of fourteen thousand, nine hundred and forty-eight dollars and ninety-seven cents, (\$14,948 97,) with interest thereon, from the first day of January,

1857, with costs of suit in this cause, to be levied of the goods and chattels, rights and credits, lands and tenements in the hands of the legal representative, (the defendant,) of Allen M. Walker, to be by him administered. Here the arbitrators called in the Honorable Eugenius A. Nesbit, as umpire in the cause, and adjourned the further proceeding of this cause until Saturday next, at 12 o'clock, M., this 7th January, 1857.

THOMAS P. STUBBS, Arbitrator.

WASHINGTON POE, Arbitrator.

MACON, GA., 10th January, 1857.

The arbitrators having differed and disagreed as to the amount of money on hand at the death of William W. Walker, which came to the hands of Allen M. Walker, as his administrator :

The said Washington Poe being of opinion that there was no sufficient evidence submitted to them to authorize or justify the arbitrators in charging defendant with a greater amount of cash on hand than is returned by Allen M. Walker, to-wit: \$3,200, and Thomas P. Stubbs differing in opinion with him, they unite and agree in calling in the Hon. Eugenius A. Nesbit, as umpire, and on this day after due notice to counsel on both sides met at 12 o'clock, M., at Macon, at the office of Stubbs, Hill & Tracy, according to adjournment, and said Nesbit being present and consenting to act as umpire, and after argument and a careful review of all the testimony taken in the cause, the said Eugenius A. Nesbit and said Thomas P. Stubbs, find the sum, after deducting one-fourth of the award shown to be \$5250,00: that is, on hand.....\$7000,00

Less one-fourth..... 1750,00

Due to complainants.....\$5250,00

Which, with interest added as calculated by us at the rate agreed upon, makes the sum due on the first day of

January, (1857,) eighteen hundred and fifty-seven, of (\$24,547,00) twenty-four thousand five hundred and forty-seven dollars, which sum we find and award in favor of the three complainants; that is, the sum of eight thousand one hundred and eighty-two dollars and thirty-three cents in favor of each of said three complainants.

This last finding and award upon condition that the said complainants do pay the compensation of the arbitrators and umpire in this cause, which said compensation so to be paid, they by the authority vested in them by consent of counsel on both sides, fix, and determine as follows, to be paid out of said fund :

To Washington Poe, (\$1000,00,) one thousand dollars.

To Thos. P. Stubbs, (\$1000,00) one thousand dollars.

To Eugenius A. Nesbit (\$500,) five hundred dollars.

The amount of money first aforesaid, to-wit : \$24,547,00 to be levied of the goods and chattels, rights and credits, lands and tenements of Allen M. Walker, in the hands of defendant his legal representative to be administered.

And to all this the said Eugenius A. Nesbit and Thos. P. Stubbs agree.

THOMAS P. STUBBS, Arbitrator.

E. A. NESBIT, Umpire.

Washington Poe consents to the above so far as the compensation of arbitrators and umpire is concerned. We, Thomas P. Stubbs and Washington Poe, find and award in favor of our clerk, Mathew H. Sandwich, the sum of one hundred dollars, one-half to be paid by defendant and the other half by complainants, 10th January, 1857.

WASHINGTON POE, Arbitrator.

THOS. P. STUBBS, Arbitrator.

Upon the coming in of this award, and upon motion by complainant's solicitors to enter the same on the minutes and make it the judgment of the court, solicitors for defendant filed their exceptions to said award and to its

being entered on said minutes and made the judgment of the court. Evidence was introduced on both sides in support of the motion and exceptions, and after hearing the same and argument, the court made the following order: Whereupon it is ordered by the court that the award be entered on the minutes of the court, and that that part which was made by the arbitrators, Washington Poe and Thomas P. Stubbs, Esqs., on the 7th day of January, 1857, be made the judgment of the court, and that execution issue in favor of the complainants for the amounts respectively awarded to them: And it is ordered that that part of the award made by Thomas P. Stubbs, Esq., one of the arbitrators, and the umpire E. A. Nesbit, be set aside, and that complainants' solicitors have leave to enter judgment in accordance with this order.

To this order and judgment both parties excepted.

JAMES M. SMITH, B. HULL, A. H. CHAPPELL, and JOHN J. FLOYD, for complainants.

O. C. GIBSON, W. H. HULL, T. R. R. COBB, and J. W. GREEN, for defendants.

By the Court.—BENNING, J., delivering the opinion.

The first question is, was the judgment right, rendered on the motion to enter the award on the minutes of the court, and to make it the judgment of the court? This question depends on the force of the objections to the award.

Those objections were numerous; the more important of them will be first considered. These may be reduced to three.

1. That N. F. Walker did not have "timely notice" of the meeting at which the umpire acted; and that in the absence of him and his counsel, the counsel of the opposite party were heard.

2. That the award was on a condition.

3. That the award was incomplete, being silent as to the demands set up against N. F. Walker, individually.

What was the force of the first of these objections? This question obviously involves several others. These I will take up in their order.

First, then, was N. F. Walker, *entitled* to a notice of the meeting, at which the umpire acted.

1. It is a general rule of the common law that the parties are entitled to notice of the meetings of the arbitrators. Anon. 1, Salk. 71. Watson on Arb. 171-2. Russ. on Arb, 191, 169. Indeed, that this proposition is true, was not disputed.

And if it be true that the parties are entitled to notice of the meetings of the arbitrators, it must be equally true that they are entitled to notice of the sittings of the umpire. "The umpire when called upon to act, is in general invested with the same powers as the arbitrators, and bound by the same rules, and has to perform the same duties." Russ. Arb., 230. In re Salkeld and Slatio, 12, Ad. and Ellis, 767, 4 Dall. 232.

Is there any thing to take the present case out of the common law rule? Have the parties agreed to dispense with the rule? There is no evidence that they have. There is nothing in the submission to show that they have. The submission is silent on the subject. Its language is, "the parties having closed, the arbitrators assisted, if need be, by an umpire chosen as aforesaid, shall proceed to make an award within thirty days after the cause is finally submitted to them." This language is somewhat peculiar. It is not this—the parties having closed, the arbitrators shall make their award within thirty days afterwards, but it is this—the parties having closed, the arbitrators shall make their award within thirty days after the cause is *finally submitted* to them. Here is room for an implication, that closing the cause by the par-

ties, was not finally submitting it to the arbitrators, but was only submitting it to them subject to be resumed if an umpire was called in. And if there is room for that implication, a regard to justice and propriety requires us to make the implication. If it is just and proper that the parties should be heard by the arbitrators, it can be but just and proper that they should be heard by the umpire. Perhaps, then, it is too much to say, as I have said, that the submission is *silent* on the point; perhaps, we ought rather to say that the submission itself speaks by implication, and declares that the parties were to have an opportunity of re-opening the case before the umpire—if one was called in—and, consequently, that they were to have notice of his being called in, and of the time and place of his sitting.

We think, then, that N. F. Walker *was* entitled to notice.

To what *sort* of notice was he entitled?

1. There is nothing in the submission on this question. For the solution of the question, therefore, we must resort to the common law; and that says, in such a case as this, merely what it says in so many other similar cases, that the notice must be a *reasonable* or "timely" notice.

Was the notice *in this case* a reasonable notice?

The sitting of the umpire was on the 10th of January, 1857, at Macon. On the 7th of January, 1857, one of the arbitrators, Mr. Stubbs, put in the postoffice at Macon, three letters, one to Mr. Gibson, one to Mr. Greene, who were the counsel of N. F. Walker, and one to Walker himself, properly addressed, in which letters he stated that an umpire had been selected, "to meet and hear the cause, at 12 M., on Saturday the 10th January, 1857, at Macon." Walker resided in Upson county, at a place about forty miles from Macon, and not near to any rail road. He never received the letter to him. Gibson resided within a mile of Barnesville, a place forty miles

from Macon, but on a railroad. He did not receive his letter till the 9th of January, at 9 o'clock, A. M.; which was, after the passenger train for Macon had passed by Barnesville. In the afternoon of that day, he replied to the letter by a freight train, and this is what he said:

"It is both morally and physically impossible for either Mr. Walker, or his counsel, to be with you, so early as tomorrow, M.; and in behalf of my client, I must beg you will allow him to be heard. Monday we cannot go, on account of Upson adjourned court." This was duly received; and was read by the arbitrators and the umpire, before the hour of meeting the next day.

Mr. Greene resided in Thomaston, twenty miles from Barnesville. He received his letter, not until the day of the meeting, and after the hour of the meeting. There was a daily mail between Thomaston and Barnesville.

Was such a notice as this a reasonable notice? Surely not, unless there was in the case something peculiar to render it so. And it was argued that there were special matters in the case, which were sufficient to render the notice reasonable. Those matters may be thus stated. The submission contained this stipulation: "and the parties and arbitrators shall so direct the case, as to have the award ready to be entered on the minutes of Upson Superior Court, at the" next November term, "if possible." That term was adjourned to Monday the 12th day of January, 1857, two days after the day appointed for the session of the umpire. The disagreement of the two arbitrators, and the consequent appointment of an umpire, did not happen until the 7th day of January, 1857. These were the special matters; and the argument was, that the arbitrators and the umpire were *bound* by the *submission*, to make up the award on Saturday the 10th of January, so that they might return it to the court, which was to meet the next Monday; and, consequently, that both, with respect to the notice given, and to the day appoint-

ed for the umpire's session, the arbitrators and the umpire did the very best that it was in their power to do. But we do not think it true, that the arbitrators and the umpire were thus bound by the submission. They were to return the award to that term, "if possible." But what was meant by "*if possible*"? that they were to so return it, even if in doing so, they would have to violate law—have to disregard a principle so important, as the one which makes reasonable notice of a judicial proceeding, a pre-requisite, to a binding judgment in that proceeding?

Besides, this part of the submission is to be construed with the part which allowed the arbitrators thirty days to make their award in, after the case was "finally submitted to them." So construed, the arbitrators would have had thirty days to make their award in, after any day they might have chosen as the day for the umpire's session. That, if not even a later day, would be the day on which the cause would be "finally submitted" to the arbitrators; and what the submission required, was, that the award should be made within thirty days after the cause was finally submitted to the arbitrators.

These special matters, then, we think, were not sufficient to render the notice a reasonable notice.

What effect did this failure to give reasonable notice to N. F. Walker, have on the award? Did it have the effect to *vitate* the whole award, or only a part—the umpirage?

The submission says, that the award "shall be binding except for fraud." Fraud in whom? In either the arbitrators, or the parties. There is no restriction of the provision to either, to the exclusion of the others.

First, then, was the failure to give the notice, a fraud in the arbitrators?

In connection with this question we must look at what occurred subsequently to the failure. What was that? The arbitrators and umpire had the session on the day

appointed. Before them appeared the counsel of the other parties, who were permitted to be heard in full—both the arbitrators and umpire, and those counsel knowing that the counsel on the other side were desirous of also being heard. The question before the umpire was a question of the utmost importance, involving about \$25,000. The notice, although not a reasonable one, as to N. F. Walker and his counsel, was a reasonable one as to his adversaries and their counsel; these counsel residing in the same place with the arbitrators and the umpire—Macon, and consequently *receiving* the notice on the same day on which it was mailed to N. F. Walker and his counsel. At any rate, they considered the notice to them sufficient, for they appeared under it without objection, and were heard. Finally the decision of the umpire was against N. F. Walker.

Now was the failure to give Walker the reasonable notice taken in connection with these consequent facts, a fraud in the arbitrators and umpire, on Walker? That is the question. It was, certainly, unfair treatment in them to Walker; and it deprived him of a most important right, the right of being heard by the umpire. And is not any unfair treatment of one of the parties to an arbitration, by the arbitrators, a fraud in them on him? Does it make any difference that they themselves gain nothing by the course they pursue, but think that they are only pursuing the terms of the submission? Certainly that these things are true, does not prevent the course from *operating* unfairly on that party. To him, the effect is the same as if the course were one that came from the worst motive and were one by which the arbitrators and umpire would themselves be gainers. I rather think myself that anything done by the arbitrators which operates unfairly on one of the parties and to his prejudice, is, in law, a fraud in them, on him. So far as the present case is concerned, it is no doubt true, beyond question, that

whatever the arbitrators did they did in the best faith— influenced by their sense of duty under what they considered the exigency of the submission. Still the question remains, did not their conduct operate unfairly on one of the parties, N. F. Walker? And was not that *in law* a fraud on him?

2. But secondly, however, this may be, we do think, that in cases of this sort, to allow the favored party to take advantage of such conduct of the arbitrators, would be to allow *him* to perpetrate a fraud on his adversary. He certainly would be a gainer by the conduct. And the arbitrators being only his agents, to allow him to profit by their unfair conduct, would be the same as to allow him to profit by his own unfair conduct. And to allow a party to an arbitration, or to an ordinary suit, to profit by his own unfair conduct, would certainly be, to allow him to perpetrate a fraud on his adversary.

We think, then, that the failure in the arbitrators and the umpire to give to N. F. Walker reasonable notice of the session of the umpire, with the facts attendant and consequent, on that failure, did amount to a fraud on him—a fraud at least in the other parties, if not in the arbitrators and the umpire.

Assuming this to be so, the next question is, how far did such fraud *vitate* the award? Did it vitiate the *whole* award or only the part of it which consisted in the *action of the umpire*?

3. If an award has a good part and a bad part, and the bad part is separable from the good; and the making of the bad part was not a condition of the making of the good; and the party in whose favor the bad part operates insists upon the good part being sustained, what can there be to prevent the good part from being sustained, and only the bad rejected? Surely there can be nothing except a special stipulation in the submission—a stipulation that there shall be not only an award as to all the matters

submitted, but that that award shall be good as to all of those matters. And so, we think, say, the authorities, on a comparative view of them, 3 Vin. Abr. Arb. (L.) 76, Ormelake vs. Cake. Cro. Jac. 355; Baspole's Case, 8 Coke; Wrightson vs. Rywater, 3 Mees. & W. 203; Russ. on Arb. 322; Wats. on Arb. 238; Pope vs. Brett, 3 Saund. 292, Note 1.

There are, however, some decisions to the contrary, perhaps. See Stone vs. Phillips, 4 Bing. N. C., 37.

Taking it to be true, then, that an award is to be upheld in the case aforesaid, unless there is in the submission a stipulation by which the award is not to be binding, except all the matters submitted are decided, the question is, does the submission in the present case contain any such stipulation? And the answer to that question must, it would seem, be in the negative. The submission contains not even the clause, "*ita quad fiat de praemissis*"—"so that the award be made, of and concerning the premises." Russ. Arb., 250. It contains no similar clause, whilst in several other important respects, it contains clauses of restriction on the power of the arbitrators. It may be said in the present case, as it was said in Wrightson vs. Rywater, (Supra,) that "the parties have given the *power* to the arbitrator to dispose of all matters, but have not made it a *condition* that all the matters should be disposed of by him."

We think, then, that the effect of the failure in the arbitrators, to give N. F. Walker reasonable notice of the session of the umpire, was merely to make the umpirage void, not to affect the other part of the award. That part, we think, remained good. And this is our answer to the general question, under consideration, viz: the question, what was the force of the first of the three main objections to the award, the objection that N. F. Walker did not have reasonable or "timely" notice of the session of the umpire, and that in the absence of him and his

counsel, the counsel of the other parties were heard by the arbitrators and the umpire.

Consequently, we affirm the judgment of the court rendered on this question of notice.

The next of the important objections to the award, was, that it was an award made on a condition.

4. The umpirage was, it is true, made on a condition ; but the condition was one confined exclusively to the umpirage. All the other part of the award had been made—completely made by the two arbitrators, before they called in the umpire. Therefore, it was impossible that the umpirage could have had any influence on them in their making that part. The condition, then, if it could affect this part of the award at all, could do so, only by affecting the umpirage. But the utmost operation it could have on the umpirage, would be to render the umpirage void. And that being void would not, as we have seen, render the other part void.

We think, therefore, that this too was not a sufficient objection.

The last of the three important objections, was, that the award was incomplete—that it contained no decision of the demands against N. F. Walker, *individually*.

5. These demands belonged either to the part of the case covered by the umpirage, or to the other part. If they belonged to the former part, the fact of their non-decision was a fact like the fact that the umpirage was on a condition ; and, therefore, was a fact that could reach the other part of the award only by its effect on the umpirage part ; and its effect on this part could not be greater than to make this part void. And that would be an effect which, as we have seen, would not be sufficient to render the other part of the award void.

If the demands belonged to the part of the case not covered by the umpirage, then it is not true that there is no decision of them in the award. If that was the fact

the two arbitrators decided them. This appears from the terms of their award. They first make their award as to two matters specifically. Then they proceed thus: "As to all other matters submitted to us, (except as to the amount of money on hand at the death of William W. Walker, and as to which we have called in the Hon. Eugenius A. Nisbet as umpire,) we find and award as follows." Then they state the particulars of the award, the sum of which statement is, that they award to the complainants respectively, several sums which, in the aggregate, amount to between \$50,000 and \$60,000, to be paid by N. F. Walker as administrator. This was equivalent to an award that Walker was not to pay anything *individually*. The maxim, *expressio unius exclusio alterius*, applies.

Either way, then, we think, that this objection was not good. And so, we also affirm the court below on this point.

The other objections were, it seemed, hardly relied on at all by the counsel for the objecting party, N. F. Walker. They, for the most part, were passed by his counsel in silence. We think it best, therefore, to dismiss them with a single remark, that if there is any merit in them we have not been able to see it, in the slight view of them which we have taken.

Thus far, then, we affirm the action of the court below.

There remains another matter, and in that we think the court erred.

The part of the case covered by the umpirage, having become open and undetermined by reason of the court's judgment declaring the umpirage void, the case was, we think, in a condition to proceed to trial, as to that part, in due course. We see nothing to show that this was not the condition of the case.

The court below seems to have decided otherwise; although we are not quite sure that we understand what

was the import, or rather the extent of the court's decision.

We think that the case, as to this part of it, ought to go on in regular course, in the court below, to a final decision.

UMPHREYS *et al.* vs. HENDRICKS.

1. One of the two witnesses to a deed pertinent to the issue, was a party defendant in the case. He was offered by the defendant as a witness to prove the deed, no excuse having been given for not calling the other subscribing witness. *Held*, That he was not competent.
2. As to the excessiveness of the damages—

Trespass, vi et armis, in Paulding superior court. Tried before Judge BROWN, at April Term, 1857.

This was an action of trespass brought by Asa Hendricks against Jesse Umpheys and others, for assaulting, beating and wounding the plaintiff.

The testimony is very voluminous, and its insertion not deemed necessary to a clear understanding of the points adjudicated. The dispute and difficulty arose in reference to the use of a road, which defendants undertook to obstruct, so as to prevent the plaintiff from passing with his wagons, &c. During the trial, defendant offered in evidence a deed executed by William Allen to Allen Umpheys, conveying the lot of land on which the road in dispute was located, and where the assault and beating occurred, and proposed to prove its execution by one of the witnesses thereto, who was a defendant in the action. The court rejected the witness on the ground of

incompetency, being a defendant. To which ruling defendant excepted.

The jury returned a verdict of seven hundred and fifty dollars damages for plaintiff.

Whereupon counsel for defendants moved for a new trial, two of the grounds of which were, that the court erred in refusing the proof as to the deed, and that the damages found by the jury were excessive.

The court refused the motion for a new trial, and defendant excepted.

NIGHT, and CHISOLM & WADDELL, for plaintiffs in error.

IRVIN & LESTER, *contra*.

By the Court.—BENNING, J., delivering the opinion.

Was the court right in overruling the motion for a new trial?

Only two of the grounds were insisted on; viz: that as to the exclusion of the witness to the deed; and that as to the excessiveness of the damages.

1. We think that the court was right in excluding the witness offered to prove the deed. He was one of the parties sued, and there was another witness to the deed, and no excuse was given for not calling him. The case, therefore, was not one in which there was room for the doctrine of necessity.

The damages were large, but we are not quite prepared to say that they were excessive.

It is true that there was evidence going to show, perhaps, that the two fighting squads were about equally to blame; but then, it is also true, that there was some evidence going to show that the Umphreys squad was the more to blame. This was, first, evidence, that they stopped up the road, although the right to its use, was by special contract in old Hendricks; secondly, evidence that

they commenced the actual hostilities; thirdly, evidence that they first resorted to their axes. This evidence, the jury had the right to believe; and if they believed it, they were authorized to find against the defendants. And if they were authorized to find against them, it can hardly be said that they might not find as much as they did. The wound was a terrible one.

Judgment affirmed.

WOOD & WHITAKER vs. TOMPKINS.

- 1 There is equity in a bill by a seecurity for the defendant in an action of trover, who has paid the judgment or a part of it to have an account from persons to whom the property was delivered during the pendency of the suit, under a collusive agreement to defraud the surety.
- 2 An agreement made by a defendant in action of trover with other persons, that they shall have the possession and profits of the labor of the negroes sued for, provided they will become his surety for the forthcoming of the property to answer the judgment, does not protect them against an account, at the instance of a security on the appeal who has paid a part of the judgment, for the value of the hire or profits to the extent that the surety has paid the judgment.

In equity, in Heard superior court. Tried before Judge Rice, August Term, 1858.

This bill was filed by defendant in error against the plaintiffs in error, and alleges, in substance, that in March, 1844, Wilson W. Brooks, as administrator of George M. Smith, deceased, instituted his action of trover against one Charles Foster, for the recovery of seventeen negroes; that Foster confessed judgment in said action, reserving

the right of appeal; that complainant became security on said appeal for Foster, and at November Term, 1850, Brooks recovered judgment against Foster for about eleven thousand dollars, to be discharged by the surrender of the negroes, and the further sum of thirty-five hundred dollars, for the hire; that the negroes were delivered up, and execution issued against Foster and complainant, as his security, for the hire and cost, which was paid off in full by complainant, Foster being insolvent and having fled the country; and complainant thereby became subrogated to all the rights of Brooks, and entitled to the full control of said execution for the purpose of reimbursing himself.

The bill further states that, pending the aforesaid action of trover, complainant took steps to require Foster, his principal in said appeal bond, to give bond and security for the forthcoming of the negroes to answer the final judgment in the cause; that in order to induce Whitaker and Wood to become his securities, and all combining to defraud and injure complainant, Foster entered into an agreement with them by which, in consideration that they would become his sureties in said *quia timet* suit, for the forthcoming of said negroes to answer the judgment in trover, they, the said Wood and Whitaker, should have the use, hire and labor of said slaves.

The bill further states that, under this agreement, Whitaker and Wood took possession of the negroes and held them for several years, during the pendency of said action of trover, and received their hire and labor, amounting to more than three thousand dollars.

The prayer of the bill is, that defendants account for the hire and labor of said negroes thus received by them, and that the amount be paid to complainant in satisfaction of the execution, issued as above stated, in the trover case, and which complainant was compelled to pay.

The defendants admit, in their answer, all the facts stated in the bill in relation to the action of trover,—the

appeal—the agreement referred to; but they state that they delivered the negroes to the sheriff, before the recovery of the judgment in trover, in discharge of the bond which they had given upon a bill of *quia timet* filed by complainant against Foster and one of these defendants, Whitaker, for the forthcoming of the negroes to answer the final judgment that might be obtained in said action of trover.

The defendants further answer and charge, that complainant received in payment or reimbursement of the amount paid by him for Foster on the execution, the sum of \$1791 from the sale of negroes belonging to Foster, in July, 1851, and that he had received a large sum of money out of other property of said Foster and its hire, sufficient to repay him the amount he paid as surety on said execution.

They admit that they took possession of the negroes under the agreement aforesaid, and which they held until the latter part of 1848, when, after notice to complainant, they surrendered and delivered them to the sheriff, and were informed by plaintiff's counsel, who was present at the time, that they were then discharged from all liability.

At the trial, defendants moved to dismiss complainant's bill, on the ground that there was no privity between complainant and defendants. The court refused the motion, and defendants excepted.

The case was then submitted to the jury upon the pleadings, proofs and charge of the court.

Counsel for defendants requested the court to charge the jury that if they believed, from the evidence, that defendants came into the possession of the negroes under an agreement with Foster, that they were to have the use of the same during the pendency of the action of trover, in consideration of their becoming his sureties,—then they will find for the defendants; which charge the court refused to give, and counsel for defendants excepted.

The jury found for the plaintiff fourteen hundred and ninety dollars.

Whereupon counsel for defendants tender their bill of exceptions, and assign as error the decisions and refusal to charge, above excepted to.

L. E. BLECKLEY and R. W. SIMMS, for plaintiffs in error.

B. H. HILL, *contra*.

By the Court.—McDONALD, J., delivering the opinion.

We think that the court below committed no error in respect to the matters on which error is assigned in the record before us.

1. If the allegations in the bill are true, which must be assumed on a motion to dismiss it for the want of equity, there is not the slightest ground on which such a motion ought to be sustained. The complainant alleges that pending an action of trover which had been instituted against one Charles Foster for the recovery of a number of negroes, and in which cause the said Foster entered an appeal and complainant became his security on the appeal bond, the defendants to said bill in the court below, Wood and Whitaker, with a full knowledge of the pendency of said suit for the recovery of the negroes and their hire, and that complainant had become his security on the appeal, contriving to appropriate the hire and use of said negroes to themselves, and to defraud and injure the complainant, colluded and combined to that end, and entered into a written agreement with the said Foster by which, in consideration that they would become securities for the said Foster for the forthcoming of the said negroes to answer the judgment in said action of trover, they, the said Wood and Whitaker, should have the hire of said negroes.

The bill alleges the payment of the hire of the negroes by complainant as surety of Foster, and that long before the rendition of the judgment in the action of trover the said Foster had been, aside from the property sued for in said action of trover, utterly and notoriously insolvent, and soon after fled the country. The bill required the defendants to account for the hire of the negroes. Now there can be no question if Foster was insolvent, or I will say, tending to insolvency, when he made the agreement with Wood and Whitaker to take the hire of the identical negroes sued for in the action of trover, under a combination and collusion with each other to defraud the complainant, he has a right to have an account from them. The complainant was already the security of Foster, at the time of the agreement and delivery of the negroes to Wood and Whitaker, and was liable to have his property seized and sold as soon as an execution could be issued upon a judgment which might be recovered against Foster for the negroes and their hire. Why did he not deliver the property to the complainant, his first surety, for his indemnity? The bill says it was his object to defraud him. We think that there is much equity in the bill, and that the motion to dismiss ought not to have prevailed.

2. The court ought not to have given in charge to the jury the instructions asked by the counsel for plaintiffs in error. Foster could not, by agreement with other persons, impair the rights and remedies of his security on the appeal, if the parties contracted with knew his rights. Notice of them would place them precisely in Foster's place.

But, on another principle, the defendant in error had a right to have an account from them. At the time they entered into the agreement with Foster, the plaintiffs knew, necessarily, that the negroes and their hire were sued for, and whether Foster was insolvent or not, as soon as they possessed themselves of the negroes and converted

them they were as much subject to an action of trover at the instance of the owner as Foster was, and the plaintiff had the same right to sue them, and recover and have satisfaction of such part of the judgement as was not paid by Foster, that they had to sue and recover and have satisfaction from Foster. By our statute the title of property sued for and recovered does not vest in the defendant until the verdict is paid. Now, the property put in the possession of plaintiffs in error, and of which they received the profits for the time, was the property of Brooks, as administrator, and it was known to them at the time they received it, that suit was pending for its recovery. If Brooks, the administrator, had not obtained satisfaction from the defendant in error as the security of Foster, he might, unquestionably, have recovered the hire from the plaintiffs in error, in the shape of damages for the time they had the negroes. As Foster is insolvent, and the security has paid a part of the judgment, he is entitled, *in equity*, to be subrogated to the rights of Brooks the administrator, against the plaintiffs in error, and that is to recover from them, to the extent of the value of the hire of the negroes for the time they held them, any part of the judgment which Foster or his effects have not paid.

We think, therefore, that the court below must be sustained in his refusal to give in charge to the jury the request submitted in writing by the counsel.

Judgment affirmed.

KNIGHT vs. KNIGHT.

- 1 When a verbal contract, as to land, has been so largely acted on as to be almost fully performed on both sides, the effect is to take the case out of our statute of frauds.
- 2 The consideration of a note was expressed to be, "value received." *Held*, that verbal evidence, that an agreement was the consideration of the note, would not be evidence to contradict the note.
- 3 When the remedy required by a case is an injunction, it cannot be true, that there is an adequate remedy at hand.

In equity, in Spalding superior court. Decision on demurrer, by Judge CABANISS, at November Term, 1858.

This was a bill by Peter Knight against William Knight, to enjoin and restrain him from the collection of a note against complainant amounting to over one thousand dollars.

The bill, in substance, states that about the year 1837 Charles Knight, the father of complainant and defendant, died in the county of Henry, leaving his last will and testament, by which he gave his entire estate (except a few small specified legacies, which have long since been delivered,) to his wife, Sarah Knight, (who was insane,) during her life, and after her death to his children; that Solomon Lasseter was appointed executor of said will, and testamentary guardian of said Sarah. After Lasseter's death, defendant was appointed administrator *de bonis non*, with the will annexed, and guardian of said Sarah, and took possession of the whole estate. Some time after his appointment as guardian of said Sarah, he was required to give additional security, and complainant became his surety in a bond with a penalty of four thousand dollars.

The bill further states, that about the year 1852 defendant informed complainant and the other remainder-men

that he desired to sell certain property belonging to said estate, viz: two negroes and a tract of land; and proposed to them that if they would consent to said sale and make no objection thereto, that he would place in their hands or loan to them the proceeds, which they could have or retain until the termination of the life estate or death of his ward, the said Sarah, paying up the interest annually for her maintenance and support, unless more should be needed; that this proposition was assented and agreed to by complainant and the others, and defendant obtained an order from the court of ordinary for the sale of said land and negroes, and the same were sold for about five thousand dollars; complainant received under the arrangement aforesaid one thousand dollars, for which he gave his note, the interest of which he has paid up punctually, and the note has been repeatedly renewed.

The bill charges that defendant has removed from the State of Georgia, and is now residing in the State of Alabama; that he has commenced suit against complainant on said note, and will obtain judgment thereon at the next term of Spalding superior court, in which court said suit is pending; that said money, (or not more than the interest thereof,) is not needed or required for the support and maintenance of said Sarah; that if defendant is allowed to collect said note and get possession of the same, complainant fears and charges that he believes he will waste and dissipate the funds to which complainant and the other remainder-men are entitled at the death of said Sarah; that complainant is still bound as surety on defendant's guardian-bond as above mentioned; and that his interest as remainder-man in said estate will fully equal if not exceed said note.

The bill prays that the action on said note be enjoined.

To this bill defendant demurred—

First. Because there is no equity in said bill;

Second. Because the agreement set up in said bill, and

on which complainant relies for relief is in parol, and cannot be made available to contradict or vary the promissory note sued on, and which contains the agreement of the parties;

Third. Because complainant's defence, if available at all, can be fully and completely made in a court of law.

The court, after argument, sustained the demurrer and dismissed the bill, and counsel for complainant excepted.

BECK, and GREEN & STEWART, for plaintiff in error.

ALFORD, and DOYAL, *contra*.

By the Court.—BENNING, J., delivering the opinion.

Was the court below right in overruling the demurrer to the bill?

The grounds of the demurrer were, that the case made by the bill was a case within the statute of frauds; a case within the rule forbidding the admission of parol evidence to vary a writing; and a case in which there was a complete remedy at law. Were any of these grounds good?

As to the first—The agreement, it is true, related in part to land; but it was an agreement nearly fully performed on both sides. The life tenant was a very old person. It had been very largely acted on by both parties. This being so, to allow one of the parties to repudiate it, would be a fraud on the other. And when that is so, the case is taken out of the statute of frauds. *Gilmore v. Johnson*, 14 Ga. R., 683.

2. As to the second ground—The note is expressed to be for "value received." In what the value consisted is not stated. Therefore, anything of value might, consistently with the note, have been the consideration; consequently the agreement might, consistently with the note, have been the consideration. It must follow, that parol

evidence to show that the agreement *was* the consideration, could not be evidence to contradict the note. And, according to the bill, which we have to take as true, the agreement was merely the consideration of the note. But for the agreement, no note would have been given by the plaintiff; no money would have been received by him. We may say, then, that the agreement was the consideration of the note. The conclusion, therefore, must be that parol evidence to prove the agreement would not be evidence to contradict the note.

Indeed, it is the general rule, that the *consideration* of written contracts is open to parol evidence. Failure of consideration is every day's plea, as well to contracts in writing as to contracts not in writing.

As to the third ground—What remedy was the plaintiff entitled to? Obviously an injunction to prevent the defendant from collecting any more of the note than the annual interest; and an injunction is a writ not grantable by a court of common law. It cannot be true, then, that the remedy at common law was adequate.

It was suggested that the prayer was not sufficient. The prayer was for an injunction of the suit, and for general relief. A special injunction requiring the defendant to abstain from collecting any part of the note but the annual interest, would, we rather think, be grantable under this prayer. At any rate, the prayer is amendable.

In our opinion, then, none of the grounds of the demurrer were sufficient.

Judgment reversed.

LINDSEY vs. LINDSEY.

A trustee brought trover. Afterwards, he moved that he might be removed from the action, and another person be put in his place; and, in support of the motion, he showed that, by regular order of court, he had been removed from the trusteeship, and that person appointed to his place. *Held*, that the motion ought to have been granted.

Motion to make new party, in Spalding superior court.
Decision by Judge CABANISS, November Term, 1858.

This was an action of trover by plaintiff in error, as trustee of Milly Lindsey, against John G. Lindsey, the defendant in the court below and in error.

Plaintiff's counsel in the court below moved to strike plaintiff's name from the record, and insert in lieu thereof as plaintiff Addison Taliaferro, trustee for Milly Lindsey, and in support of this motion offered in evidence an order of court, whereby he had been removed from the trust, and Taliaferro appointed in his place.

The court overruled the motion, and plaintiff excepted.

L. T. DOYAL, for plaintiff in error.

PEEPLER and FLOYD, *contra*.

By the Court.—BENNING, J., delivering the opinion.

Was the court right in overruling the motion?

The motion was made by the plaintiff, the original trustee, and was, in substance, that he might be dismissed from the case, and Addison Taliaferro put in his place. This motion he supported by evidence showing that, by a regular proceeding in court, he had been removed from

the trusteeship, and Taliaferro been appointed trustee in his place.

We see no reason why the motion should not have been allowed. The removal of the trustee caused the action to become defective; to become subject to a plea in abatement. The action, however, was still in court, and the old trustee was still plaintiff. The action was still in a state to need amendment; to need a substitution of the new trustee, as plaintiff, for the old. And the amendment act of 1854 says, that pleadings shall be amendable in all respects, at any stage of the cause. Of course the mode must be by motion.

It was argued, that before Taliaferro could become trustee, there would have to be a conveyance to him of the trust property by the old trustee. It is unnecessary to decide this question, and it is not decided. The proof was, that Taliaferro had been appointed to the place of the old trustee, by a court having jurisdiction to make the appointment. We, therefore, are to presume, at least *prima facie*, that everything was done by the court that was necessary to make the appointment effectual. Consequently we are to presume that, if a conveyance from the old trustee to the new was necessary, such a conveyance there was.

Judgment reversed.

CLOUD & SHACKLEFORD vs. DUPREE.

- 1 In a claim case the sayings of the defendant in *fi. fa.*, if against his interest, and made before the commencement of the suit against him, are admissible as evidence for the claimant.

The expression, "*bona fide creditor*" in the act of 1847, for recording

marriage settlements, means a creditor who gives credit on the faith of the property contained in the marriage settlement.

Claim, from Spalding. Tried before Judge CABANISS, at November Term, 1858.

This was a claim case, and the facts and proceedings had in the court below are as follows:

Cloud & Shackleford obtained judgment against Charles T. Dupree and John F. Dupree, at November Term, 1855, of Spalding superior court, and execution issued thereon dated 9th January, 1856, which was levied upon two negroes—Dock, a boy, and Rosetta, a girl, as the property of Charles T. Dupree. Levy made 29th September, 1858.

To this property a claim was interposed by C. L. Dupree, as trustee of Mrs. Mary A. G. Dupree, the wife of said Charles T. The property was claimed for her under a marriage settlement, made prior to her marriage, and by which said negroes and other property therein mentioned were secured to said Mary A. G. and her children. The marriage settlement bears date 29th November, 1854, and was recorded 4th April, 1855.

At the trial, claimant offered to prove the sayings or declarations made by Charles T. Dupree, one of the defendants in *fi. fa.*, before the suit against him, to the effect that he was holding the property as trustee for Mrs. Dupree, while it was in their joint possession. Counsel for plaintiffs objected to this testimony; the court overruled the objection so far as to allow the sayings and declarations of defendant to be given in evidence, which were made relative to his possession of the negroes before the commencement of the suit.

The evidence being closed, plaintiffs requested the court to charge the jury that the property is subject to the execution, if the marriage settlement was not recorded within the time prescribed by law—that is, within three months from its execution,—unless the claimant shows that plain-

tiffs had notice of it at the time or before they gave credit to defendant. The court refused so to charge; but charged the jury, that marriage settlements must be recorded within three months from the execution thereof, in the office of the clerk of the superior court of the county of the husband's residence; if so recorded, they are good against a *bona fide* creditor without notice, but if not recorded within this period, they are not absolutely void, but void only as to a *bona fide* creditor who may give credit to the husband before the same is recorded; and a *bona fide* creditor is one who gave credit upon the faith of the property contained in the marriage settlement and in the possession of the husband. To be a *bona fide* creditor, the credit must be given without notice of the marriage agreement, and upon the belief that the property belonged to the husband and was liable for his debts. To which charge counsel for plaintiffs excepted.

The jury found for the claimant, and plaintiffs in *fi. fa.* moved for a new trial upon the ground that the court erred in the rulings, charge and refusal to charge, as above excepted to, and on the further ground that the verdict was contrary to law and evidence.

The court refused the motion for a new trial, and plaintiffs excepted, and assigned the same as error.

J. Q. A. ALFORD, and DANIEL & DISMUKE, for plaintiffs in error.

L. T. DOYAL, and PEEPLES & CABANISS, *contra*.

By the Court.—BENNING, J., delivering the opinion.

Was the court below right in receiving the sayings of the defendant in *fi. fa.*, offered as evidence by the claimant?

We think so. The sayings were against the defend-

ant's interest, and were uttered before the suit against him was commenced. They, therefore, were admissible both according to principle and to several decisions of this court. 8 Ga., 66; 20 Ga., 220; Ibid, 240.

If the court was right in charging what it did, it was certainly right in refusing to charge what it was requested to charge; for the two things, the charge and the request, were inconsistent with each other.

The question, then, may be, was the court right in its charge?

The part of the charge complained of amounted to this: That what is meant in the act of 1847, for recording marriage settlements, by the expression, "*bona fide* creditor," is a creditor who "gives credit" to the husband on the faith of the property contained in the marriage settlement. Is this a true exposition of those words? We think it is. The part of the act containing those words is as follows:

"If any such instrument be not recorded within the time prescribed by this act, the same shall not be of any force or effect against a *bona fide* purchaser without notice, or *bona fide* creditor without notice, or *bona fide* surety without notice, who may purchase, or give credit, or become surety, before the actual recording of the same."—Cobb's Dig., 180.

The purchaser, creditor, surety, are to be without notice, and also *bona fide*. They are to be something more, then, than mere real purchasers, creditors, sureties, without notice. They are to be also something, to adapt them to the "*bona fide*." What is there, to be that additional thing, except this: that they are to purchase, give credit, become sureties, relying, "*bona fide*"—"in good faith"—on the property contained in the marriage settlement? We see nothing. Therefore, not to hold that this is what was meant by the words *bona fide*, would seem to be equivalent

to rejecting those words, or, at least, equivalent to rendering them inoperative and useless.

And equity and justice favor this construction. The wife herself is a purchaser for a valuable consideration. Marriage is a consideration of the first value. Then she, by her mere marriage, has as high an equity as any creditor, purchaser, or surety can have. If in addition, it is she that finds the property contained in the settlement, she has an equity far higher than theirs. And in this case the wife did find the property contained in the settlement. Surely creditors of the husband ought not to wish to get that property, unless that property was what they relied on when they gave him the credit.

Judgment affirmed.

TURNER vs. THURMOND.

A gift of a slave, if in writing, signed and sealed by the donor, attested by one subscribing witness, and proved or acknowledged, and recorded within twelve calendar months from its execution, is good against a subsequent purchaser, although he may be a purchaser without actual notice of the gift.

Trover, for two negroes, from Henry county. Tried before Judge CABANISS, at October Term, 1858.

Henry N. Pope, on the 22d day of November, 1841, executed a deed of gift, conveying to his infant son, Washington J. Pope, the following property, to-wit: "Eadey, a woman about twenty-two years of age; Mahala, a woman about twenty years of age; Jordan, a boy about sixteen years of age; Jackson, a boy about thirteen years of age;

Amanda, a girl about eight years of age; Phillis, a boy five years of age; James, a boy four years of age; Ann, a girl one year of age; also, one bureau, a clock, folding table, two pine tables, carriage and two horses, three beds and three bedsteads, a work-stand, and a candle-stand, thirteen painting frames, to have and to hold all and singular, the above negroes and other property hereby given, bargained and sold to the said Washington J. Pope, my son, as aforesaid, his heirs, executors, administrators and assigns forever, together with all and singular the increase of the said negroes, accruing or to accrue, for the individual use of my said son, Washington J. Pope, his heirs and assigns," &c.

The consideration of this gift is stated in the deed to be the natural love and affection which the donor bears to the donee, "and to provide for his education and support, and to promote his welfare and success in life." The deed was recorded 23d December, 1841, and at the time and until his death, the said Washington lived with his father, the donor, who remained in possession of the negroes sued for till his death. These negroes were Jim and Toby, children of Eady, one of the women named in the deed of gift, worth about one thousand dollars each. Washington J. Pope died young and under age, when, precisely, does not appear. His father, the donor, subsequently died intestate, and Edward F. Knott took out letters of administration on his estate, and obtained an order from the court of Ordinary, to sell all the negroes of the estate of said Henry N. Pope, deceased. By virtue of this order, the administrator sold the two negro boys in question, to Allen W. Turner, who purchased the same at public outcry—paid a full and fair price for them.

Afterwards, Thurmond, the defendant in error, took out letters of administration on the estate of Washington J. Pope, deceased, and brought this action of trover for the recovery of said slaves.

The court charged the jury that if Henry N. Pope conveyed the negroes in controversy by deed of gift to his son Washington J. Pope, and if the deed was signed and sealed and attested by at least one witness, and was proved and acknowledged, and recorded within twelve calendar months from its execution, it is good and valid against a subsequent purchaser from Henry N. Pope, or his administrator, without actual notice; and if such be the proof in this case, they should find for the plaintiff.

The jury found for the defendant, and plaintiff moved to set aside the verdict and for a new trial, on the ground that the verdict was contrary to law, to the charge of the court, and to the evidence, and without evidence.

The court, after argument, granted the motion for a new trial, on the grounds therein stated, and defendant excepted.

L. T. DOYAL, and JNO. J. FLOYD, for plaintiff in error.

PEEPLES & CABANISS, and L. J. GLENN, *contra*.

By the Court.—BENNING, J., delivering the opinion.

Was the court right in granting the new trial? We think so.

The evidence brought the case within the Act of 1838, "to provide a mode of making gifts of slaves." The act is in these words: "That no gift of any slave or slaves, hereafter to be made, shall be good or available in law, or in equity, against the creditors of the donor, or subsequent purchasers from him, without actual notice, unless the same be made in writing, signed and sealed by the donor, attested by at least one subscribing witness, and should be proved or acknowledged, and be recorded within twelve calendar months from the execution thereof." Cobb, Dig. 176, and see 25 Ga., 17.

Consequently, the jury should have sustained the deed; and they not doing so, the court was right in granting a new trial.

Judgment affirmed.

COTHRAN vs. CUNNINGHAM.

It is admissible for indorsers of a promissory note to prove that they were entitled to notice of demand of payment and refusal to pay by giving evidence that the note on which the endorsement was made, was given for negotiation, or intended to be negotiated at a bank, or, that it was deposited in a bank for collection.

Complaint, in Floyd superior court. Tried before Judge HAMMOND, February Term, 1859.

This was an action by C. F. Cunningham, as endorsee, against W. S. Cothran & Co., endorsers, on the following promissory note:

\$357 00.

Nov. 17, 1857.

Thirty days after date we promise to pay to the order of W. S. Cothran & Co., three hundred and fifty-seven dollars, value received, payable at the office of W. E. Lucy & Co., at Gadsden, Ala.

[Signed.]

W. E. LUCY & CO.

Endorsed, "W. S. COTHRAN & Co."

W. S. Cothran, one of the defendants, testified that he did not know anything about the endorsement until after the note became due, and then Pentecost, (a partner and a defendant,) told him they were endorsers. Did not know whether Pentecost was in Rome at the date of the note or not—he never saw the note, and only knows what

Pentecost told him. They, the defendants, have agencies and offices in Alabama—they are doing a steamboat business in that State—does not know where the note was endorsed—the note was discounted in bank.

The jury found for the plaintiff, and defendant moved for a new trial, which the court overruled and defendants excepted.

D. S. PRINTUP, for plaintiffs in error.

UNDERWOOD & SMITH, *contra*.

By the Court.—McDONALD, J., delivering the opinion.

Indorsers of promissory notes given for negotiation, or intended to be negotiated at any chartered bank, or deposited in any chartered bank for collection, are entitled to notice of the demand and non-payment of said notes before they are liable on their endorsements. Cobb's new Dig., 594. The note sued on is not payable at a bank, and it does not appear on its face that it was given for negotiation, or intended to be negotiated at a chartered bank, or that it was deposited in such bank for collection. But, notwithstanding it does not so appear on the note, the indorsers are not precluded from shewing it. If a promissory note be negotiated at a bank, it is some evidence that it was intended to be negotiated there, and evidence that it was so negotiated ought to be admitted, that the jury may consider it. But it is by no means conclusive evidence that it was intended to be negotiated at the bank where it was made and endorsed, but is certainly testimony that ought to be considered in trying that issue. If, in addition to evidence that the note was negotiated at bank, it be proved that it was negotiated in renewal of a note which had been given by the makers to the bank, the presumption would be very much strengthened, if it would not become a conclusive one, that it was

given for negotiation at the bank. It would be difficult to resist the conclusion that such was the fact. If the note was not, in fact, negotiated at the bank, but was deposited there for collection, then the endorsers were entitled to notice. We think the court below erred in rejecting this evidence; and, inasmuch as the alleged error of the court in ruling it out, is made the first ground in the motion for a new trial, it is our judgment that the court ought to have granted it.

It was no defence that the plaintiffs in error were accommodation endorsers. Bills of exchange and promissory notes are an exception to the rule which requires a consideration to give validity to a contract; and if the plaintiffs in error desired to avail themselves of the laches of the holders in suing, they ought to have given notice to sue. Without this notice, they run the risk of the insolvency of the makers. If they wished to have avoided risk, they should have given the notice or paid the note, and sued on it themselves. There was no error in the rejection of Sloan's evidence, therefore.

Under the evidence, the contract was *presumptively* made in Georgia.

As the law was expounded by the presiding judge, in excluding evidence offered by plaintiffs in error, the verdict was not subject to the objection made in the fourth ground in the motion for a new trial.

The principle involved in the fifth ground in the motion for a new trial, depends so much upon the question, how the jury should find the facts which would make a notice necessary, we forbear to pass upon it. If demand and notice be necessary to render the indorsers liable, we will say that there must be a *legal* demand.

As the law was expounded in the court below, the verdict conformed to it. We cannot assume facts to exist which were proposed to be proven, but not admitted by

the court, and upon that presumption, declare that the verdict was contrary to law.

We see no error in the admission of the evidence of Col. Wade S. Cothran. He disclaims all knowledge of the time at which the endorsement was made.

What we have said on other grounds embraced in the motion for a new trial, disposes of the 8th and 9th grounds in that motion.

For the reasons we have assigned, we reverse the judgment of the court below and order a new trial.

Judgment reversed.

WESTERN & ATLANTIC R. ROAD vs. CARLTON.

1. The jury are to determine on the credit they will give a witness, who has been impeached on one side for want of character, but who has been supported on the other by counter proof. That the jury believed him is no ground to set aside a verdict as being against evidence.
2. When the State engaged in the carrying business on the W. & A. Rail Road, it assumed the obligations and liabilities incident to that business when carried on by individuals, and subject to the remedies by suit against the superintendent of the road, when the claim cannot be otherwise adjusted.
3. The plaintiff, in a suit against the superintendent of the road is not restricted to the amount claimed when he presented his account to that officer for settlement. As in other cases he recovers according to his proofs under the law.

Case, in Fulton superior court. Tried before Judge BULL, at October Term, 1858.

The facts of this case, and the points adjudicated, will

sufficiently appear from the following opinion of the court, pronounced by Judge McDonald.

OVERBY & BLECKLEY, for plaintiff in error.

J. M. & W. L. CALHOUN, *contra*.

By the Court.—McDONALD, J., delivering the opinion.

Charles W. Carlton instituted a suit in the superior court of Fulton county, against the superintendent of the Western & Atlantic Rail Road, for the recovery of damages done to a lot of hogs freighted by the plaintiff on the cars running on that road. The jury on the trial rendered a verdict for the plaintiff for two thousand dollars. The defendant moved for a new trial, on five grounds, to-wit:

1. Because the verdict of the jury was contrary to the evidence, and strongly and decidedly against the weight of evidence.

2. Because the court erred in charging the jury that the State was bound to keep enough cars on hand in good order to do the business on the road, with reasonable dispatch, and that if the plaintiff was damaged by reason of a car having failed, or given out while on the trip, the plaintiff must recover.

3. Because the court erred in charging the jury that in assessing damages they might find the highest or lowest amount proved, or any intermediate amount.

4. Because the court erred in refusing to charge the jury as requested by defendant's counsel, that the plaintiff could recover no greater amount in this case, than he claimed at the time of making his demand of the superintendent.

5. The verdict was for a larger amount than that so demanded.

The court overruled the motion and the defendant excepted.

1. The only principle on which the plaintiff in error proposed to sustain the first ground in the motion for a new trial was, that Price, a principal witness for the plaintiff below, was discredited. There were many witnesses to impeach, and many to sustain his credit; whether the jury would believe him was for their determination upon the evidence submitted.

If they gave him credit we cannot say that they were wrong.

2. In support of the second ground in the motion, it is insisted that the State is not a common carrier, and is not subject to the rules of law which apply to common carriers. When a State embarks in an enterprise which is usually carried on by individual persons or companies, it voluntarily waives its sovereign character and is subject to like regulation with persons engaged in the same calling. But, if under such regulations citizens acquire rights for wrongs or injuries sustained at the hands of the agents of the State, in conducting the business in which the State may have embarked, there may be, ordinarily, a difficulty in regard to the remedy to which the injured party might be entitled. In such cases in England, the King is petitioned in his court of chancery, and the chancellor administers right as a matter of grace, not by compulsion. Here the usual course pursued by the citizen, has been to petition the Legislature; and that has been the resort when no other remedy has been provided. The Legislature, however, has wisely and justly provided a remedy for persons having claims against the Western & Atlantic Rail Road. They may present them for settlement to the superintendent of the Rail Road. If a dispute should arise concerning any claim which cannot be amicably settled, a claimant may bring suit against the superintendent of the Rail Road. We think, then, that

the State engaging in the carrying business, assumes the obligations and liabilities incident to that business when carried on by individuals, and the remedy is by suit against the superintendent of the road when the claim cannot be adjusted without.

The third ground in the motion is abandoned by the plaintiff in error in this court.

3. The refusal of the court below to charge the jury, at the request of defendant's counsel, that the plaintiff can recover no greater amount in this case than he claimed at the time of making the demand of the superintendent, is made the fourth ground in the motion for a new trial; and the fifth ground is, that the verdict was for a larger amount than was demanded. We think that there was no error in refusing a new trial on these grounds. At the time the injured plaintiff asked a settlement, he may not have been apprised of the extent of his loss; and if he was, he might have been satisfied with a less sum, provided he could obtain a settlement without expense and trouble. We know of no foundation in reason, justice or principle, for the support of the position. If a person having a claim against the road, and a settlement is refused him on demand, he may sue, and the suit in such case, must, like all others, be determined upon the evidence submitted by the parties and the law applicable to it.

Judgment affirmed.

JOHNSON vs. MARTIN.

In a showing for a continuance by a defendant, he swore that he expected to prove by an absent witness that he had turned over notes to the plaintiff's agent, which that agent "was to apply to the

note sued on." *Held*, That this meant, that the notes were received *in payment* of the note sued on ; and, therefore, that the showing was sufficient.

Assumpsit, from Spalding county. Tried before Judge CABANISS, at November Term, 1858.

Upon this case being called for trial, the defendant moved for a continuance, and in support of his motion submitted the following affidavit:

"Georgia, } He, the defendant, states that he
Spaulding County, } has two witnesses in said case who
are absent, without his procurement or consent, namely :
W. R. Phillips, and M. M. Lockhart ; that W. R. Phillips
has been subpœned, and that he resides in the county of
Spaulding—that he expects to prove by him, that Egbert
Daniel was the agent of the plaintiff, and as such agent of
the plaintiff, received from the defendant notes to the
amount of about five hundred and fifty-eight dollars,
which he was to apply to the note sued on by the plain-
tiff in this case, which this defendant relies on in his
defence as payment to that extent of said note. That he
expected to prove by Lockhart the admission of said agent,
that he had received said notes from this defendant—
that said Lockhart from the best of defendant's informa-
tion and belief, now resides in the State of Alabama ; and
that he has so recently left this State that it has not been
in defendant's power to take his depositions—that he
endeavored to take them, but could not get the interro-
gatories crossed in another case in which said Daniel was a
party."

The court refused the motion for a continuance, on the ground that the affidavit did not specify what particular notes had been received by plaintiff's agent, nor the amount due thereon, nor was it stated that defendant expected to prove that said notes had been collected, and that he was entitled to credit for the amount thus col-

lected. And plaintiff was allowed to take a verdict for the full amount sued for. Whereupon counsel for defendant excepted, and assigned said decision as error.

ALFORD, and BECK, for plaintiff in error.

DANIEL & DISMUKE, and PEEPLES & CABANISS, *contra*.

By the Court.—BENNING, J., delivering the opinion.

Was the court below right in refusing the continuance?

That depends on this—was the matter which the defendant, the party moving for the continuance, expected to prove by either of the absent witnesses, pertinent to any of the issues?

Among the issues was, it seems, one on a plea of payment, and one on a plea of set-off.

The matter which the defendant in the case, Johnson, expected to prove by Phillips, was what is expressed in the following words of his affidavit, viz: "That Egbert P. Daniel was the agent of the plaintiff, and as such agent of the plaintiff, received from the defendant notes to the amount of about five hundred and fifty-eight dollars, which he was to apply to the note sued on by the plaintiff in this case, which the defendant relies on in his defence, as payment to that extent."

As we interpret these words, the meaning is, that the "notes" turned over, were to go in *payment* of the note sued on. It is not said that the *proceeds* of the notes were to be applied to the payment of the note sued on, but that the notes themselves were to be so applied.

And if the notes were to be applied in payment, there was a payment by them, to the extent of what they amounted to; or a right to set them off against the note sued on.

Consequently, this matter was pertinent to one, if not to both of the issues aforesaid.

Grice vs. Graham.

And we think that the matter was set forth in the showing for the continuance, with sufficient certainty. The evidence, if it had been present, would have had sufficient certainty about it, to require its admission.

We think, then, that the court below was *not* right in refusing the continuance.

Judgment reversed.

GRICE vs. GRAHAM.

1. If one of the grounds on which a new trial is moved, is that the verdict of the jury is contrary to the charge of the court, and the charge is not sent up, that ground will not be considered.
2. The verdict of the jury not being contrary to the weight of evidence, a new trial will not be granted.

Case, in Carroll superior court. Tried before Judge HAMMOND, October Term, 1858.

This was an action by Graham against Grice, for maliciously and illegally suing out an attachment against plaintiff, and seizing his horses and buggies, whereby he was damaged to the amount of three hundred dollars.

The jury found for the plaintiff thirty-five dollars, and defendant moved for a new trial on the ground that the verdict was contrary to law and evidence, and the charge of the court. The court overruled the motion for a new trial, and defendant excepted.

BURKE & BLACK, for plaintiff in error.

MERRILL, *contra*.

By the Court.—McDONALD, J., delivering the opinion.

This was an action on the case for wilfully suing out an attachment against the plaintiff, and seizing his property thereon. The witnesses testified to rumors that the plaintiff had run away, but no facts were testified to which would support the rumors. He left home to carry his sister-in-law to Alabama, and it seems that he was the owner of a livery stable and stock, horses and buggies which he left behind him. The evidence shows that the defendant dismissed his attachments after the plaintiff came home and defended. The plaintiff proved expenses to which he had been put in consequence of the suing out the attachment, &c., &c. The jury rendered a verdict in favor of the plaintiff, and the defendant moved for a new trial, on the ground that the verdict was against the evidence, the weight of the evidence and the charge of the court. The court below refused a new trial, and the judgment refusing it is assigned as error. The charge of the court to the jury is not sent up in the record, and that ground cannot, therefore be considered.

The jury were warranted by the evidence in finding that the attachment had been wrongfully issued and levied on the property of the plaintiff, and the damages found are moderate enough. The defendant ought to be well satisfied that a larger verdict was not rendered against him.

Judgment affirmed.

CLOPTON vs. NORRIS.

An attorney not feed in *the case* may be employed to execute a commission to take the deposition of witnesses ; and if the witness examined in reply to a question, "who are present at the execution of these interrogatories, and who of them is feed counsel or agent for plaintiff in taking them ?" says that "no one is present but the commissioners and myself," the answer is full and sufficient for the objects contemplated by the party asking the question.

Case, for false and deceitful warranty of soundness of slave, in Polk superior court. Tried before Judge HAMMOND, April adjourned Term, 1858.

This was an action on the case brought by Joseph M. Norris against David Clopton, for the recovery of damages for falsely and deceitfully warranting a negro woman sold by defendant to plaintiff to be sound.

At the trial, a great deal of evidence was offered on both sides, but the only errors assigned were the admission by the court of the testimony of two witnesses, on the part of the plaintiff, to-wit:

1. The depositions of Charles S. Harrison, to the reading of which defendant's counsel objected, on the ground that W. N. Hutchins, one of the commissioners who executed the commission to take the depositions of this witness, was an attorney at law, and paid by the plaintiff to take said depositions ; which objection the court overruled, and defendant excepted.

2. The depositions of George N. Lloyd, to the reading of which defendant objected, on the ground that the witness had not answered the last interrogatory, which was, "who are present at the execution of these interrogatories, and who of them is the feed agent or attorney for plaintiff in taking them ?" To which witness answered,

"No one is present but the commissioners and myself." The court overruled the objection and allowed the depositions to be read, and counsel for defendant excepted.

The jury found for the plaintiff, \$792 60.

Whereupon defendant's counsel tendered their bill of exceptions, assigning the foregoing decisions as error.

CHISOLM & WADDEL, and JOHN A. JONES, for plaintiff in error.

SHROPSHIRE, *contra*,

By the Court.—McDONALD, J., delivering the opinion.

There is no rule of law which prohibits a party to a suit from employing an attorney to execute a commission to take the depositions of witnesses. An attorney retained in *the cause* cannot aid as commissioner or be present at the execution of the interrogatories.

To a question propounded to a witness, "who are present at the execution of these interrogatories, and who of them is the feed counsel or agent for plaintiff in taking them?" he answered, "no one is present but the commissioners and myself."

The defendant objected to the reading of the evidence given by this witness, on the ground that he had not fully answered that question. We think the answer was quite sufficient. If the commissioners had both been paid for their trouble in taking them, that would not have disqualified them. Of what profit to the defendant would a fuller answer have been? None at all.

The question was not what counsel employed in the case took the interrogatories, but what counsel or agent was employed to take them? If commissioners are paid merely for the time and trouble of executing the commission, and are not employed to be paid on condition the evidence benefits the party, or on any such unjust and ne-

Mosely vs. the State of Georgia.

farious stipulation or understanding, there can be no objection to the evidence taken by him on the ground that he was paid for that service.

Judgment affirmed.

MOSELY vs. THE STATE OF GEORGIA.

To constitute the offence of malicious mischief under our Code, it is not necessary to prove actual ill-will or resentment towards the owner or possessor of the property. If the act be done, wantonly and recklessly, or under circumstances which bespeak a mind prompt and disposed to the commission of mischief, it is sufficient.

Indictment, from Gordon county. Tried before Judge TRIPPE, at October Term, 1858.

Henry Mosely, the plaintiff in error, was indicted for malicious mischief.

Upon the trial, Benjamin A. Rollins, on the part of the State, testified that four of his cows were shot; he went up to where defendant lived and asked him if he shot them; defendant replied that he did shoot them, and he had plenty of money to pay for them, if they died; that he shot them with peas, then with small shot, and then with large shot. There was no ill-will between witness and defendant, and they were friendly before defendant shot his cows. When he saw the cows after they were shot, they were a short distance from the mill where defendant lived; that one of the cows died in eight days after she was shot, and another died from the effects of the shooting afterwards.

The testimony here closed, and the court charged the jury, that it was not necessary that defendant should have entertained ill-will or malice towards the owner of the property, or should have intended to injure the owner, to constitute the offense of malicious mischief; that if the jury believe that the defendant shot the cows wantonly and recklessly, the law will presume malice, whether he intended any injury or not.

To this charge defendant excepted.

The jury found the defendant guilty; whereupon his counsel moved for a new trial, upon the grounds:

1st. Because the verdict is contrary to law;

2d. Because the verdict is contrary to evidence and without evidence;

3d. Because the verdict is strongly and decidedly against the weight of evidence;

4th. Because the court erred in its charge to the jury.

The motion for a new trial was overruled, and defendant excepted.

J. W. H. UNDERWOOD and W. F. WOFFORD, for plaintiff in error.

Sol. Gen. JOHNSON, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

Was the charge of the court in this case right, namely: that “if the defendant wantonly and recklessly shot the cattle of the prosecutor, the law will imply malice, whether he intended any injury to the owner or not?”

For aught that appears in the evidence, the shooting was without provocation or excuse. Rollins found his cattle shot, near the mill of the defendant; he asked defendant if he did it; he said he did, and that he had a

Carnes vs. the State of Georgia.

plenty of money to pay for them if they died. Two of them did die.

To constitute the crime of malicious prosecution under our Code, it is not necessary to prove actual ill-will or resentment towards the owner or possessor of the property; but if the act be done under circumstances which bespeak a mind prompt and disposed to the commission of mischief—or, in the language of the court, “wantonly and recklessly,” it is sufficient. Injuries inflicted on personal property in a passion, or under reasonable provocation, stand perhaps upon a different footing.

Judgment affirmed.

CARNES vs. THE STATE OF GEORGIA.

A new trial will not be granted in a criminal cause, on the ground that the verdict of the jury is contrary to law, the charge of the court, evidence and without evidence, if the court below has charged the jury fully and correctly on the law, and the evidence has been fully submitted to the jury, and there was some evidence to support the verdict, and the presiding judge has refused to grant a new trial.

Indictment for Riot, from Milton county. Tried before Judge RICE, at November Term, 1858.

Lewis Tucker, Asberry Carnes, Amos Chapman, Tolver Bettis, and James Pettit were indicted for a riot.

The jury found Carnes, Bettis and Tucker guilty; and acquitted Pettit. Carnes moved for a new trial on the following grounds:

1st. Because the verdict of the jury was contrary to law;

2d. Because the verdict was contrary to evidence and without evidence;

3d. Because the jury found contrary to the charge of the court.

The court overruled the motion for a new trial, and counsel for Carnes excepted.

J. B. BROWN, for plaintiff in error.

SOLICITOR GENERAL, *contra*.

By the court.—McDONALD, J., delivering the opinion.

The court below refused the motion for a new trial, and his judgment is excepted to.

All the grounds in the motion for a new trial may be considered together.

Riot is the doing, by two or more persons, either with or without a common cause of quarrel, an unlawful act of violence or any other act in a violent or tumultuous manner.—Cobb, 811. To constitute a riot, it is not necessary that the act done by the parties should in itself be unlawful. If it be done in a violent and tumultuous manner, the offence is complete.

The evidence in this case shows that there was a kind of general fight. A part of the testimony shows great forbearance on the part of the plaintiff in error, and reluctance to enter into it, and would seem to make out a case bordering on justification so far as his particular fight was concerned, while other parts of it show that he was not without blame. One of the witnesses testified that he stood up to Chapman, and that they stood up to each other.

The presiding judge presented the law very fairly to the jury. He charged them that if either of the defendants did nothing more than defend himself, he had a right

to do that ; and if such insolence, by words, was used towards either defendant on trial, as in their opinion would justify an assault, if he chastised the assailant reasonably, he ought to be acquitted.

In criminal cases jurors are judges of the law as well as the fact. They have, upon a full charge upon the law of the case by the court, and upon hearing all the evidence, found the law and the facts against the plaintiff in error: the judge who heard the cause refused to grant a new trial. There is some evidence to sustain the verdict, and we will not, in such a case, disturb the judgment of the court below. Judgment affirmed.

WEATHERFORD vs. SHEGAG ET AL.

1. When an act is directed to be done at a particular term of the court, the session of which is prevented by providential cause, the act may be done at the next ensuing term.
2. Where bail process is sued out, under the act of 1857, it is not necessary that the sum sworn to should be endorsed upon the declaration when filed.

Bail Process, from Chattooga county. Decision by Judge CROOK, at March Term, 1859.

Weatherford sued out bail *process* against Shegag and another, under the provisions of the act of 1857, allowing process alone to issue on the affidavit, and providing for filing the declaration at the term of the court to which the process is returnable. The process was returnable to September Term, 1858, of Chattooga superior court, which term was not held, owing to the prevalence of small pox

in the vicinity; and the court was adjourned by order of the judge to the next March Term, without his coming to the court.

At March Term, 1859, defendants moved to discharge the bail, on the grounds:

1st. Because, although the sum sworn to was endorsed on the process, it was not endorsed on the petition or declaration; and

2d. Because the petition was not filed until March Term, 1859, of the superior court of said county, although the process was returnable to September Term, 1858.

The court granted the motion on the first ground, but refused it on the second. To which decision plaintiff excepted.

TAYLOR, and WALKER, for plaintiff in error.

DODSON, and GLENN, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion,

Both parties except in this case. Bail process was sued out by Weatherford, under the act of 1857, (Pamphlet Acts, 103;) under the old law the declaration had to be made out and filed in the clerk's office before bail process could issue.—Cobb, 477. But the act of 1857 makes it lawful and sufficient to serve the defendant with a process and copy of the affidavit, as in cases of bail pending the action. And at the term to which said process is returnable, the plaintiff is required to file his declaration; and the subsequent proceedings shall be as in other cases of bail.

Two questions were decided by the court:

First. That in as much as the court did not meet at the term to which the process was returnable, owing to the existence of a contagious disease, that the next term en-

Sentell and Pursell vs. Mitchell.

suing was the appearance term, at which the plaintiff was allowed to file his writ; and we affirm this ruling, which disposes of Shegag's exception.

The court secondly held, that the amount sworn to should not only be endorsed on the process, but also upon the petition when filed. The statute does not require this to be done; neither does the act regulating bail, *pendente lite*, to which this is assimilated.—Cobb, 479. There is no reason why it should be done.

We are compelled, therefore, to reverse the court upon this ground.

Judgment reversed.

SENTELL AND PURSELL vs. MITCHELL.

M. agreed with S. & P. to sell them a pair of mill stones, mill irons, and gearing, and to put up the machinery for \$211, payable in installments at a future day. He delivered the mill stones and irons, but failed to do anything else, under the agreement. S. & P. retained the mill stones and irons. Before the future day, M. sued them on an account, for the mill stones, irons and gearing. *Held*, that the action lay, so far as the mill stones and irons were concerned.

Complaint, from Chattooga county. Tried before Judge Crook, at March Term, 1859.

This was complaint on an account by William Mitchell against Joseph Sentell and Thomas Pursell, for two hundred and eleven dollars. The bill of particulars attached to the petition was as follows, viz:

Joseph Sentell & Thomas Pursell, Dr.
To William Mitchell.

1856. To 1 pair mill rocks, mill irons and gearing, \$211.00

The defendants pleaded the general issue, breach of warranty, and failure of consideration.

Upon the trial, plaintiff proved that defendants agreed to pay him two hundred and eleven dollars for the mill rocks, iron and gearing; that the plaintiff was to set up the machinery, and that defendants were to pay one hundred dollars on the 25th December, 1857, and the balance 25th December, 1858.

But the same witness who proved the above facts also testified that plaintiff had not complied with his part of the contract. Plaintiff further proved that the mill rocks and irons were worth forty or forty-five dollars, and that they went into the possession of defendants. Here plaintiff closed.

The action was commenced 7th February, 1857.

Defendants moved to dismiss the plaintiff's suit, on the grounds:

1st. That the contract was entire and mutual, and the plaintiff not having performed his part thereof, could not maintain the action.

2d. That the action was prematurely commenced, no cause of action existing at the time the writ was filed, to-wit: 9th February, 1857; and the proof showing that the first installment was not due till 25th December, 1857.

The court refused the motion to dismiss, and defendants excepted.

Plaintiff then moved to amend his declaration, by inserting a quantum meruit count; defendant objected to the amendment. The court granted leave to amend, and defendants excepted.

The jury found for the plaintiff twenty-five dollars.

Whereupon defendants tendered their bill of exceptions, assigning as error the decisions above excepted to.

JESSE A. GLENN, for plaintiff in error.

WM. H. DABNEY, *contra*.

By the Court.—BENNING, J., delivering the opinion.

Was the court right in overruling the motion to dismiss the suit?

The suit was founded on an account—an account for goods sold and delivered—not on any special contract.

The proof showed that there was a special contract, and that the contract had been broken by Mitchell, the plaintiff in the action. To be more particular, the proof showed that it was agreed by him and Sentell & Pursell, the defendants in the action, that he was to furnish them with a pair of mill stones, with mill irons and gearing, and was to put up the machinery; and that he was to do all this for \$211, of which \$100 was to be payable on the 25th December, 1857, and \$111 on the 25th December, 1858.

The proof further showed that Mitchell had furnished the mill stones and mill irons, but had failed to do anything more under the agreement.

This being the state of the facts, Sentell & Pursell had the right to return the mill stones and irons, and to repudiate the contract, or the right to retain the mill stones and irons, on paying for them what they were worth, and to sue Mitchell for the breach of his contract; but they had no right to retain the mill stones and irons without paying for them what they were worth. They elected to retain the mill stones and irons. Consequently, they became liable to pay Mitchell for them what they were reasonably worth, notwithstanding that he himself was guilty of a breach of the contract. And if they were under this liability to him, it was of course his right to sue them on the liability. And that is all that he has done. His action is on this liability; not on the special contract. It is an action for the price of the mill stones, mill irons and

gearing, as goods sold and delivered generally. His proof establishes the sale and delivery of the mill stones and mill irons, but not of the gearing. And, therefore, his proof makes out his case only to a partial extent; but to that extent it does make it out. True, the count is one corresponding with the common *indebitatus* count for goods sold and delivered, and not with the common *quantum meruit* count; but the difference between these two counts is merely formal.

These things being so, it must be manifest that nothing drawn from the special contract could amount to an answer to the action. And yet both grounds of the motion to dismiss the action were drawn from the contract. They were, that by the contract, Mitchell was to do certain things which he had failed to do, and by the contract, no money was to be paid him until a day that had not arrived when he sued. If he was not suing on the contract, but on a right derived from the conduct of the parties sued, in retaining his property, it is plain that neither of these things could be an answer to his suit.

We think, then, the court was right in overruling the motion to dismiss the action.

It is useless to consider the question as to the allowance of the amendment, the action being good without the amendment.

Judgment affirmed.

BROWN vs. THE STATE.

1. The testimony given by a witness on the trial of another defendant in the same indictment, cannot be read to the witness, on the trial of another defendant, to refresh his memory or for other purpose.



2. Witness called by one party and sworn but not examined, cannot be cross-examined by the other party, but that party may call and examine him as his own witness, and ask him leading questions, unless he shows a bias against the party who first called him, or was sworn by mistake.
3. The refusal of the court to allow a witness to depose whether he heard the sheriff called on to arrest the defendants, for that they had killed the deceased, is not error.
4. Presence and participation in the act of killing a human being, is not evidence of consent and concurrence in the perpetration of the act, by a defendant charged as aiding and abetting in the killing, unless he had a felonious design or participated in the felonious design of the person killing.
5. If the person charged with murder in the first degree, commit the assault on the deceased with a deadly weapon, but his intention to assault him with a deadly weapon was unknown to the person charged in the same indictment as principal in the second degree and he intended to participate in an assault and battery only, and in no design to kill, he is guilty of manslaughter only.
6. If a person charged in an indictment as principal in the second degree is connected with the act of killing, but is not connected with the intention to kill, and does not know that the person killing intended to use a deadly weapon in making the assault, he is guilty of manslaughter; but if the court charged the jury that his being connected with the act of killing made him guilty of murder, a new trial ought to be granted if the jury convicted him of manslaughter only.
7. If a charge of the court be more favorable to a defendant than the evidence would warrant it is no ground for granting a new trial.
8. If there be nothing in the evidence to call for a charge of the court on the law of involuntary manslaughter, it is not error in the court to fail to give it.
9. If the court fail or omit to charge the jury in regard to any particular point, claimed by counsel to be involved in the cause, and the counsel make no request in writing, of the court to charge the jury on said points, they must be held to have been satisfied with the charge as given.
10. Errors complained of must be plainly and distinctly set forth in the bill of exceptions.
11. Principal charged with murder in the second degree may be put on his trial for murder, after a defendant charged as principal in the first degree, has been convicted of voluntary manslaughter.
12. A juror cannot be allowed to impeach his own verdict.

13. New trial will not be granted merely to examine a witness who had given evidence in the cause on a point on which he could give negative evidence only.
14. New trial will not be granted when the weight of evidence supports the verdict.

Murder, in Spalding superior court. Tried before Judge CABANISS, ——— Term, 1858.

The plaintiff in error was indicted for the murder of Harvey Williams, as principal in the second degree.

At the conclusion of the testimony, the court charged the jury as follows :

Charge of the Court.

The court charged the jury as follows: The defendant, David Brown, stands indicted as principal in the second degree for the murder of William H. Williams; Shildrake Brown is charged in the same indictment, as principal in the first degree; but David Brown is alone on trial before you, and it is upon his guilt or innocence that you are to pass.

In criminal cases you are the judges of the law as well as of the facts; it is, however, the duty of the court to explain the law to you, but you are not concluded by the opinion of the court as to the law; but it is your province to judge of that as well as the facts, and to be governed by your judgment in one case as in the other. The defendant is charged with the crime of murder—he is presumed to be innocent until the contrary is made to appear; it is incumbent on the State in the first place to prove the killing, to show that the crime has been committed as charged in the indictment, and to show that the defendant is guilty of the offence with which he stands charged, and you are to look to the testimony to determine these facts. If the proof is sufficient to satisfy you

that a homicide has been committed, and that the defendant was concerned and participated in the killing, you will then look to the circumstances which have been proved, and from your opinion as to the facts in proof determine the grade of the homicide—whether it be murder, manslaughter, or justifiable homicide: and to enable you to determine as to the grade of the killing, the court will read to you from the penal code the sections applicable to the case before you. (Here the court read various sections of the penal code.)

You will in the first place enquire if the circumstances in proof are such as to connect the defendant, David Brown, with the homicide of the deceased—if he was present, aiding and abetting the perpetrators of the act, he is in law equally guilty with the one who struck the mortal blow. When two or more persons are engaged in the same illegal purpose, any act done by one of the party in pursuance of that purpose, and with reference to it, is in contemplation of law the act of all; and proof of such act is evidence against any or either of the others who were engaged in the combination. To make out the guilt of the principal in the second degree it must appear that he aided and abetted the perpetrator of the deed, and that he gave his assent to the commission of the crime; and presence with participation in the act committed is evidence from which the jury may infer consent and concurrence.

The jury must look to the circumstances which have been proved, and from these circumstances determine the question whether the defendant aided, abetted or participated in the killing of the deceased. If he did not, he is not guilty of the crime charged, and must be acquitted.

If he aided and abetted and participated in the homicide, your next enquiry will be as to the grade of the offence—whether the facts are sufficient to bring it under the definition of the crime of murder; that is, whether

the deceased was killed with malice aforethought, either expressed or implied. No case of homicide can be a case of murder if it is not accompanied by malice aforethought, either expressed or implied. Express malice is the deliberate intention to take away the life of a fellow creature manifested by external circumstances capable of proof. If express malice has not been shown, you will look to the facts in proof, and enquire whether they imply malice. Malice shall be implied when no considerable provocation appears, and when all the circumstances of the killing show an abandoned and malignant heart. To rebut the presumption of malice and to reduce the killing from murder to manslaughter, the provocation by words, menaces, threats, or contemptuous gestures, shall in no case be sufficient to free the person killing from the guilt of murder. And if life be taken in consequence of such provocation by words, threats, menaces or contemptuous gestures, it will be taken under circumstances which imply malice. In all cases of homicide in which the provocation is by words, threats, menaces, or contemptuous gestures, the offence is not reduced from murder to manslaughter. But where there is some actual assault, or some considerable provocation other than provocation by words, threats, menaces, or contemptuous gestures, the offence may be reduced from murder to manslaughter, if there is not sufficient time for passion to cool between the assault or the considerable provocation, and the killing. If the defendant was connected with the killing of the deceased, if he aided, abetted, and participated therein; and if he received no assault from the deceased or no considerable provocation, the law in such a case implies malice, and he is guilty of the highest grade of homicide, viz: murder. You will look to the evidence, and from all the facts determine this question. But if the facts in proof are not sufficient to make this a case of murder, then you will enquire whether it is manslaughter. Every case of

homicide not accompanied by malice, expressed or implied, is a case of manslaughter or justifiable homicide. Manslaughter differs from murder in the important particular of the absence of malice, as when it happens in a sudden heat of passion—when passion has obtained dominion over reason and the gentler feelings of the heart. From a respect to human infirmities the law in such case mitigates the offence and reduces it from murder to manslaughter. Still this is unlawful, the law not permitting any man to avenge his own wrongs by killing the supposed offender unless in a case of great emergency.

There must be some actual assault on the person killing, or an attempt by the person killed, or some considerable provocation by him other than provocation by words, threats, menaces, or contemptuous gestures, and the killing must be the result of that sudden, violent heat of passion, supposed to be irresistible under such assault, such attempt or such considerable provocation, to reduce the offence from murder to manslaughter. But if there be no such assault; no such attempt or no such considerable provocation, the offence is murder; and manslaughter, if there was an actual assault on defendant by deceased, or some attempt by deceased to commit a serious personal injury on the defendant, or if the deceased gave the defendant a considerable provocation and before his passions had time to cool and subside; if the defendant under such circumstances participated in the killing, he is guilty of voluntary manslaughter and not murder, unless the evidence further shows it to be a case of justifiable homicide; and if it is such a case the defendant is entitled to a verdict of an acquittal. But before you give the defendant a verdict of entire acquittal, you must enquire whether the case is a case of justifiable homicide.

The cases of justifiable homicide are: 1st. An execution of public justice as where an officer executes a criminal pursuant to the sentence of the law. 2d. In advance-

ment of public justice; as when an officer in the due execution of his office kills a person who assaults or resists him. 3d. In self-defence against one who intends to commit a felony, as murder, robbing, or the like—the intent of the aggressor must be to commit a felony: If it be only to commit a trespass as to beat the party, it will not justify the killing of the aggressor. The assault or the trespass as above described on the person killing, may reduce the offence from murder to manslaughter, but cannot justify the killing. To authorize the killing and make it justifiable homicide, it must be an attempt to commit a felony on the habitation, property, or person of the slayer. 4th. Against persons acting in a riotous or tumultuous manner. In such a case there must be more than one person.

Sections 12, 13, and 15, of the code, relate to the right of self-defence, and they constitute the law which must govern you in your determination upon this branch of the case. The right of self-defence is given by the 12th section against one who manifestly intends to commit a felony by violence or surprise on the habitation, property, or person of another.

Section 13th limits this right by requiring that the circumstances to justify the killing must be sufficient to excite the fears of a reasonable man, and that the party killing really acted under the influence of these fears, and not in the spirit of revenge.

And the 13th section still further restricts the right by providing that the danger shall be so urgent and pressing at the time of the killing that in order to save his own life, the killing of the other was absolutely necessary. If the deceased intended, or was endeavoring by surprise or violence to commit a felony on the habitation or property or person of the defendant, or the habitation, property, or person of his son; and if the defendant acted under circumstances which were sufficient to excite the

fears of a reasonable man and was influenced by those fears and not by a spirit of revenge; and if at the time of the killing the danger was so urgent and pressing that to save his own life, or the life of his son, the killing of the deceased was necessary, and the deceased was the assailant, then the defendant was justifiable, and you should acquit him. But if there was no such attempt to commit a felony on the habitation, person, or property by the deceased, or the habitation, person, or property of the principal perpetrator, and if there was no reasonable ground to fear such an attempt, and if at the time of the killing the danger was not so pressing and urgent that the killing was absolutely necessary to save his life, or the life of the principal actor, then he was not justifiable in aiding, abetting and participating in taking the life of the deceased. You will take into consideration all the facts as proven by the witnesses in this case, and from those facts determine whether the killing of the deceased was murder, manslaughter, or justifiable homicide. If murder, and you are satisfied beyond a reasonable doubt that the defendant aided, abetted and participated in the killing, find him guilty of murder. If it be a case of manslaughter, and the defendant aided, abetted or participated in it, find him guilty of voluntary manslaughter. If it be a case of justifiable homicide, acquit him. If the circumstances proven are such as to raise a reasonable doubt in your minds as to the guilt of the defendant, acquit him. Though you may have no doubt of the guilt of the principal in the first degree, yet if you have a doubt whether the defendant gave his consent and concurrence to the act of the principal in the first degree, give him the benefit of that doubt and acquit him. But the doubt must be a reasonable doubt, it must not be assumed to be used as a pretext for acquitting the defendant, but must actually exist and must arise from such a state of facts as to leave the mind in doubt on which side the truth lies.

When such a doubt exists, the humanity of the law gives the accused the benefit of it and acquits him. If the doubt is as to his guilt, acquit him. If it is as to the grade of the offence, that is whether it is murder or manslaughter, in the latter case give him the benefit of the doubt and find him guilty of the less offence. If you should come to the conclusion that the defendant is guilty of the offence with which he stands charged, the form of your verdict will be :

"We the jury find the defendant, David Brown, guilty of murder."

If you think him guilty of manslaughter, you will say : "We the jury find the defendant, David Brown, guilty of manslaughter."

If you think him not guilty, you will say : "We the jury find David Brown not guilty."

The jury found the defendant guilty of voluntary manslaughter, whereupon his counsel moved for a new trial upon the following grounds :

1. Because the court erred in refusing to permit defendant's counsel to read to the witness, Wm. R. Moseley, his testimony as taken down on the trial of Shildrake Brown, but held that they might read the testimony themselves, and ask if he had testified to such and such facts and then introduce witnesses who heard him testify and contradict him if they could by such witnesses ; but that they could not contradict by showing from his testimony, as written down, that he had testified differently from his former testimony.

2. Because the court erred in refusing to permit defendant's counsel to cross-examine Wm. H. Bishop, a witness introduced and sworn by the State for the purpose of identifying the knife of Shildrake Brown, but which testimony was objected to and excluded by the court ; and said witness not having been examined any further, the court held that as the State had not examined the wit-

ness the defendant had not the right to cross-examination; yet might introduce him as his own witness if he saw proper to do so.

3. Because the court erred in refusing to permit defendant's counsel to have a reply from Robert Wise, a witness for the State, to the following question, to-wit: Did you immediately after the difficulty hear Holcomb cry out to Wooten, the sheriff, to arrest the Browns for they had killed Harvey Williams?

4. Because the court erred in charging the jury that presence and participation in the act committed is evidence from which the jury may infer assent and concurrence.

5. Because the court erred in charging the jury, that if the defendant now on trial, to-wit, David Brown, was connected with the killing of the deceased—if he abetted and participated therein, and he had received no actual assault from the deceased or no considerable provocation, the law in such case implies malice, and he was guilty of murder.

6. Because the court erred in charging the jury, that if there was an actual assault upon the defendant by the deceased, or some attempt by deceased to commit a serious personal injury on the defendant, or if the deceased gave the defendant a considerable provocation otherwise, and if under a sudden heat of passion arising from such assault or such attempt, or some considerable provocation, and before his passions had time to cool or subside, the defendant under such circumstances participated in killing the deceased, he is guilty of voluntary manslaughter and not murder; unless the evidence further shows it to be a case of justifiable homicide.

7. Because the court erred in failing to read the 16th section of the Penal Code, in connection with other sections relating to justifiable homicide. [The court failed entirely to read such portions of the code as had no connec-

tion with the case made by the evidence, and charged that the sections of the code which the court did read constituted the law which must govern the jury in determining the question. The court read on this branch of his charge only the 12th, 13th and 15th sections of the code.]

8. Because the court erred in charging the jury "if it be a case of manslaughter, and the defendant aided, abetted and participated, find him guilty of voluntary manslaughter:" thereby withholding from the jury the right to find him guilty of involuntary manslaughter in the commission of an unlawful act, or of a lawful act without due caution or circumspection.

9. Because the court erred in instructing the jury, that if they believed the defendant guilty of manslaughter the form of their verdict would be, "we the jury find the defendant, David Brown, guilty of voluntary manslaughter;" and failed to give them any form for a verdict of involuntary manslaughter, giving only the form of a verdict for murder and of voluntary manslaughter, and a general verdict of not guilty; and thereby in effect charging them to find the defendant guilty of murder, or of voluntary manslaughter, or to acquit him entirely.

10. Because the whole charge as delivered to the jury was calculated to mislead them.

11. Because by the indictment Shildrake Brown was charged with the offence of murder as principal in the first degree, and David Brown as aiding and abetting him, and the court failed to charge the jury that it was essential to make out the charge as to said David Brown that the State should prove to the satisfaction of the jury, that David Brown, at the time of the committing of the act by the said Shildrake Brown, knew of his intention and design to commit a murder, manslaughter, or other felony, on the body of the deceased.

12. Because the court erred in failing to charge the jury, that in order to constitute a principal in the second

degree, three things were necessary, to-wit: 1st, That there must be an actual or constructive presence at the committing of the act. 2d, There must be an aiding and abetting in the act committed. 3d, That such aiding and abetting must have been with a felonious design, and with knowledge of the design of the principal actor.

13. Because the court erred in charging that presence and participation in the act was evidence of consent and concurrence.

14. Because the jury found contrary to the evidence.

15. Because the verdict is against the weight of evidence.

16. Because the jury found contrary to law.

17. Because the jury found contrary to and against the charge of the court.

18. Because the principal actor having been convicted of voluntary manslaughter only, David Brown could not be convicted of any crime under the indictment.

19. Because the defendant's counsel argued before the jury, that in order to convict David Brown as principal in the second degree, the State was bound to prove a common purpose of the defendants to commit an unlawful act or felony, and that in the absence of such proof David Brown could not be affected by the act of Shildrake Brown, which the court omitted or failed to charge.

20. That if the fact done by Shildrake Brown was the result of his own intention exclusive of any influence or abetting of David Brown, then David Brown could not be affected by Shildrake's act—which the court failed to charge.

21. That to implicate David Brown in his son's act or guilt, the evidence must show the act to have been done in furtherance of a common purpose—which the court failed to charge.

22. Because one of the jurors, to-wit, Waldrop Warren, while the jury was out on said case and before the jury

made up their verdict, said to his fellow jurors that it could have been proved by the State that David Brown saw his son and conversed with him when he went out of the grocery, when the difficulty took place, before the fatal blow was given, and before his son came into the grocery.

23. Because since the trial defendant's counsel have discovered that defendant can prove positively, by William M. Cline, that neither defendant nor any other person told Shildrake Brown had gone out at the back door.

The court overruled the motion for a new trial, and defendant by his counsel, excepts and assigns said decision as error.

ALFORD, FLOYD, and MARTIN, for plaintiff in error.

SOL. GEN. DANIEL, DOGAL, PEEPLES & CABANISS, *contra*.

By the Court.—McDONALD, J., delivering the opinion.

The defendant was indicted for the offence of murder, as principal in the second degree. The party charged as principal in the first degree has been tried and convicted of voluntary manslaughter. This plaintiff in error, on his trial, was convicted of voluntary manslaughter also. After his conviction, he moved, by his counsel, for a new trial on twenty three grounds, all of which appear in the statement of the case hereto prefixed. The court below, after hearing argument on the motion, refused a new trial, and the plaintiff in error excepts to that judgment.

1. The first ground in the motion for a new trial is predicated on the refusal of the court to allow the counsel of plaintiff in error to read to a witness under examination, evidence given by him, and which was taken down in writing on the trial of the party accused as principal in the first degree. If they wished to read the testimony to the witness to refresh his memory as to what he had tes-

tified before, it was clearly inadmissible. It was not a memorandum made by himself, which, without considering other grave objections to it, was a quite sufficient reason for excluding it, if offered for that purpose. If the object was to discredit the witness, the presiding judge very properly ruled, that they might acquaint themselves with the evidence formerly given by the witness, and interrogate him as to testimony he delivered on the trial of the other defendant, and contradict him, if they could, by witnesses who heard him testify, but not by the testimony reduced to writing on that trial. It does not appear that the counsel examined the witness as suggested by the court. If they had so interrogated him, and had then proven that the evidence proposed to be read was the testimony of the same witness, and that it was truly taken down at the time, we will not say that the court ought not to have admitted it. The record does not so present the point.

2. The next ground in the motion is founded on the refusal of the court to permit a witness to be cross-examined who had been sworn by the prosecution, and to whom but a single question had been propounded, and that not answered, on account of an objection made by prisoner's counsel. The proposition of the counsel for the plaintiff in error was to examine him at that time, not to explain any point in his testimony, because he had delivered none, but to examine him on matters deemed important to the defence. We think the court was right. When a witness is sworn by one party, but is not examined by him, the opposite party has the right to call him as his own witness and to ask him leading questions as in a cross-examination, unless the witness was sworn through mistake, or shows a manifest bias in favor of the party against whom he was first called. Bac. Ab. Evidence E.

3. That the presiding judge refused to allow the witness Robert Wise to testify whether he heard Holcomb, imme-

diately after the difficulty, cry out to Wooten, the sheriff, to arrest the Browns, for they had killed Harvey Williams, is made the third ground in the motion for a new trial. We can see no relevancy, in this question, as it is presented in this record, to the issue before the jury. Answered either way it could not have any possible influence. If the witness did not hear the call, it is no evidence that Holcomb did not call. There was, at the time, great bustle and confusion, and it does not appear that the attention of the witness was directed to that particular matter.

4. Because the court charged the jury that presence and participation in the act committed is evidence from which the jury might infer consent and concurrence, is made the fourth ground in the motion for a new trial. The plaintiff in error contends that this charge is not the law, that the court omitted one essential element in the crime, charged in this indictment. The prisoner was charged with murder as principal in the second degree, and he was on his trial for that offence. The charge of the court must be considered in reference to the accusation. The principal in the second degree could not be convicted of murder without a felonious design. He may have perpetrated the homicide, or participated in it, but without a felonious design he could not be guilty of murder. A person charged in the indictment as principal in the second degree, who is present aiding and abetting, without any felonious design, or without participating in a felonious design, cannot be guilty of murder. He must have known the purpose and intent of the perpetrator of the act, to have participated in his design. The terms "consent and concurrence" here, must mean consent and concurrence in the killing, and if there were consent and concurrence in that by the prisoner, he must have been guilty of murder, for consent and concurrence imply thought, deliberation, and a conclusion of the mind—de-

cision. But if there was no design to commit a felony on the part of the perpetrator of the act, or if there was, and it was unknown to him who was present aiding and abetting, and he had none himself, there could have been by him no consent or concurrence in the act, and his being present aiding and abetting the act which resulted in a killing, cannot be evidence of consent and concurrence in the homicide. If the jury had convicted the plaintiff in error of murder, there would have been ground of grave complaint of this charge; but he was convicted of manslaughter only, and he could not have been prejudiced by it, as the jury must necessarily have found that he was not guilty of "consent and concurrence."

5. Shildrake Brown was charged with murder as principal in the first degree, and the plaintiff in error as principal in the second degree; and if Shildrake Brown assaulted the deceased with a deadly weapon, and his intention to assault him *with such weapon* was unknown to David Brown, and he supposed that his object was to assault and beat deceased only, and he intended to participate in the assault and battery only, and participated in no design to kill, he was guilty of manslaughter only—while the actual felonious perpetrator was guilty of murder. 1 Chit. Cr. Law 258.

6. The fifth ground in the motion for a new trial is alleged error, in the charge of the court, "that if the defendant on his trial was convicted with the killing of the deceased, if he aided, abetted and participated therein, and had not been assaulted by the deceased, and no considerable provocation appears, the law in such case implies malice, and he is guilty of murder." This charge of the court is subject to the same objection as that part of the charge last considered. The charge of the court ought in all case to expound the law as applicable to the facts of the case in proof, and should go no further. There is no evidence that the prisoner on his trial had a weapon of any sort;

there is no evidence that he knew the design of his son to kill ; or that he was armed with a deadly weapon—the term “connected,” as used in the charge is a broad expression, and is given a broad application. The prisoner may have been connected with the *act* of killing, when he may not have been connected with the *intention* to kill ; and if he was not connected with the intention as well as the act, he could not be guilty of murder. But as the accused was not found guilty of murder, the charge did him no wrong.

7. The charge of the court making the sixth ground in the motion for a new trial, is more favorable to the plaintiff in error than the evidence in the case would warrant. There is no evidence in the record that the deceased made any assault upon him, or of an attempt by the deceased to commit a serious personal injury upon him, or that he otherwise gave him considerable provocation. On the contrary, the evidence shows that the deceased acted on the defensive throughout, and that whatever injury he inflicted on the prisoner, was done while he was thus acting. Yet the court in his charge gave the prisoner the benefit of the supposition the deceased had acted aggressively towards him.

There is nothing in the evidence to authorize a charge of the court on the sixteenth section of the fourth division of the Penal Code ; and the counsel for the plaintiff in error acquiesced in the omission if there was any. He made no request of the court in regard to that matter.

8. In my judgment, there was nothing in the evidence in this case requiring a charge on involuntary manslaughter. The general definition of involuntary manslaughter is the killing of a human being without any intention to do so, and yet the same section of the code which gives the definition, shows that the killing of a human being without any intention to do so, (contrary to the mere definition,) may amount to the crime of murder. It is said that an assault

and battery is an unlawful act, and if it be committed without any intention to kill, it can be but involuntary manslaughter. An assault and battery with a bludgeon, of such size as if used on a human being would likely produce death, is an unlawful act; and if it be used positively without any intention to kill, but nevertheless death does ensue, under the *definition*, it would be involuntary manslaughter; but *under the law* it would be murder, because an assault and battery with such an instrument naturally tends to destroy life. If the unlawful act committed by the accused be to inflict a *voluntary personal* injury on another, or a *voluntary* injury upon the *person* of another, the voluntariness of the act and intent to injure the person must characterize the crime. Every statute must be construed, and this interpretation of the act harmonizes with the legislative construction of it so far as it relates to the offence of murder. We therefore think that a new trial ought not to have been granted on the alleged error in the charge as specified in the 8th ground in the motion.

9. If the counsel for the plaintiff in error desired the charge of the court to the jury on the several matters of which they now complain in the 9th, 11th, 12th, 19th, 20th and 21st grounds in the motion for a new trial, that the court failed or omitted to charge, they ought to have submitted written requests to the court for said instructions to the jury. Not having done so, they must be held to have acquiesced in the failure or omission, if indeed, there were any.

10. There is no specification in the 10th ground of the motion, of any matter in which the charge of the court was calculated to mislead the jury, and the exception is too vague, general, and uncertain to be considered. The act requires that the errors complained of shall be plainly and *distinctly* set forth in the bill of exceptions. Acts of '55 and '56, 201.

It is unjust to the opposite party who might be surprised by an elaborate argument on a point in the charge which he might consider unexceptionable. The excepting party ought to understand his own case, and point out the errors of which he complains.

The exception in the thirteenth ground in the motion has already been disposed of in considering the fourth ground.

11. The eighteenth ground makes the point, that after the conviction of the defendant, charged with murder as principal in the first degree, of the offence of voluntary manslaughter only, the defendant on trial, who is charged as principal in the second degree, can not be convicted of any crime under the bill of indictment. This point has, in effect, been decided by this court in the case of *Boyd vs. The State*, 17 Ga. Rep. 194. The point there was, whether the defendant charged with murder as principal in the second degree, could be tried before the defendant charged as principal in the first degree, and it was held that he could. The authorities then sustain the decision of the court in this case. But Wallis's case is an authority directly in point. He was tried at old Bailey, in 1703. The indictment in that case was against A for murder, and also against Wallis and others as persons present, aiding and abetting A therein. A was first tried upon this indictment and acquitted, and afterwards Wallis was tried upon it. Holt, C. J., determined that though the indictment be against the prisoner for aiding and assisting and abetting A, who was acquitted, yet the indictment and trial of that prisoner (Wallis,) was well enough; for all are principals, and it is not material who actually did the murder.

12. A juror cannot be allowed to impeach his own verdict, and therefore the twenty-second ground in the motion cannot be supported.

13. According to the affidavit of Cline, of whom it has

been said new evidence was discovered, it appears that he will only testify to one fact in the case differently from another witness who had given positive evidence. The evidence of Cline is negative, and it ought not to have counterbalanced the testimony of a positive witness, if he had given it on the stand. But Cline had given evidence and testimony so obviously of some weight to the defence, and which, being present, he must have been able to give according to his recollection of it, ought not to have escaped either the defendant or his counsel.

14. The remaining grounds from the 14th to the 17th inclusive, that the verdict of the jury is contrary to evidence; against the weight of evidence; contrary to law; and contrary to and against the charge of the court, may be disposed of in a few words. What we have already said in disposing of the other grounds in the motion is sufficient on the point that the finding of the jury was contrary to law. The charge of the court, so far as it respects the crime of manslaughter, we have held to be right and the verdict of the jury conforms thereto. As to the verdict being against the evidence and the weight of the evidence, we will refer briefly to some of the leading facts in proof, and which are uncontraverted. On the night of the homicide the deceased and this prisoner had some difficulties in which no deadly weapons had been used, the deceased acting on the defensive and endeavoring to avoid a personal contest. They had fought, but their fight had ended and the deceased was in the back yard. At this time the son of the prisoner came in and asked him what was the matter. He replied that "Harvey Williams had scratched him." He enquired for Williams, and prisoner told him he had gone out at the back door. The two Browns went immediately to the door, when the son instantly inflicted the mortal blow, the prisoner striking the deceased with his fist at the same time. There was no considerable provocation, if any, and the

circumstances of the killing were such as to imply malice on the part of the son who killed the deceased. He used a deadly weapon, and that is evidence of malice and felonious intent. It does not appear that the prisoner knew the purpose or intent of the slayer, or that he intended to use a deadly weapon. But he committed an assault and battery on the deceased, and intended to do him a personal injury, which involves him in the guilt of manslaughter of which the jury convicted him. We therefore sustain the judgment of the court below.

Judgment affirmed.

HARLOW vs. ROSSER, SCURRY & CO.

1. A second certiorari may be sued out in the same case, provided the first was not dismissed upon the merits.
2. It is not indispensably necessary that the clerk should endorse "filed," on the petition for certiorari.
3. Where a previous certiorari has issued and been answered by the magistrates and subsequently dismissed, the answer of the justices to the first certiorari may be adopted and sent up by them as their response to the second.
4. The firm of A & B sue C on a partnership debt—it is not allowable for C to settle the claim by crediting it with the amount due him by one of said firm, without the knowledge and consent of the other partner.

Certiorari, from Chattooga county. Decision by Judge Crook, at March Term, 1859.

Rosser, Scurry & Co., sued John Harlow on an account for goods, wares and merchandise, in a justice court. Defendant, upon the trial, proved that Thomas T. Hop-

kins, one of the firm of Rosser, Scurry & Co., being indebted to him, promised and agreed to pay and settle defendant's account with said firm, and in pursuance of said agreement he settled with and gave credit to Hopkins on the account or demand he held against him, Hopkins.

The justice gave judgment for the plaintiffs, and defendant appealed. Upon the trial on the appeal in the justice court, the jury found for the defendant, and plaintiffs excepted, and sued out a certiorari.

Upon the hearing in the superior court, counsel for the defendant moved to dismiss the certiorari, on the ground that a former certiorari, returnable to March Term, 1858, had been dismissed. The court overruled the motion and defendant excepted.

Defendant next moved to dismiss the certiorari on the ground that the petition for certiorari was not *filed* in the clerk's office. This motion the court overruled and defendant excepted.

Plaintiffs then proposed to read the return of the justices to the certiorari, to which defendant objected, on the ground that the certiorari bears date 15th April, 1858, and the return proposed to be read, is in answer to a certiorari, dated 9th of February, 1858, and said return bears date 23rd February, 1858. The court overruled the objection and the answer was read, and defendant excepted.

The court sustained the certiorari, and ordered a new trial in the justice court, holding that the defendant could not pay or settle a debt due by him to Rosser, Scurry & Co., with an individual debt or demand, which he held against Thomas T. Hopkins, one of the members of said firm. And to this decision defendant excepted.

JESSE A. GLENN, for plaintiff in error.

ROSSER, represented by D. A. WALKER, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

1. Was it error in the court to refuse to dismiss the certiorari in this case, because there had been a previous certiorari in the same case which had been dismissed? We think not. It does not appear that the former certiorari was decided upon its merits. We take it for granted it was not—but that it was for some informality or defect in the proceedings.

2. Is it indispensable that the clerk should endorse upon the petition for certiorari, “filed,” at such a time? We are of the opinion that it is not.

3. The present writ of certiorari is dated the 15th of April, 1858; and the answer of the magistrates is to a writ which purports to be dated the 9th day of February, 1853. And their return bears date the 23rd of February, 1858. The reading of the return was objected to on the ground that it bore date prior to the writ of certiorari to which it was a response. The explanation of this anacronism is this: The justices adopted and sent up their response to the first certiorari as their answer to this. Suppose the objection were sustained, the only effect would be to require the justices to answer over; and thus delay the case, without being productive of any compensating benefit.

4. The justices allowed a debt due by Harlow to Rosser, Scurry & Co., to be discharged by crediting the amount on an account due him by Thomas S. Hopkins, one of said firm. The circuit judge held, and of course correctly, that this could not be done; and sustained the certiorari on that ground. The contract of copartnership invested Hopkins with no such right, and no special authority was shown to have been conferred on him to that effect. The transaction, from ought that appears to the contrary, was without the knowledge of the other partners, and without any sanction or ratification on their part.

Judgment affirmed.

SHANDS & CO. vs. HOWELL & CO.

If, in a suit on a foreign judgment it appears that of eight defendants, the officer served five, but he does not designate the five by name, and it appears that the parties, plaintiffs and defendants appeared by counsel, and the jury in their verdict mention each of the eight defendants by name, and say they find against the defenants, and it appears that an appeal was entered, and that on a motion to dismiss the appeal, all the defendants mentioned by name were appellants, it is sufficient *prima facie* evidence against two of the eight defendants sued here, that they appeared and defended—it is not conclusive on them, however, they may prove the contrary.

Debt, on foreign judgment, from Lumpkin county.
Tried before Judge RICE, at January Term, 1859.

This was an action of debt, by Almanin Shands and Joshua Robertson, miners and partners under the name and style of A. Shands & Co., against Andrew Howell, Phillip Howell, Rufus Howell, Phillip Stonecipher, Jo-berry Mullinax, Thomas Thomson, Thomas Phillips and Andrew J. Mullinax, late a mining company in the State of California, mining and trading there as partners, under the firm and name of A. Howell & Co., on a judgment obtained against said defendants in the State of California, for six hundred dollars besides cost.

Andrew Howell and Andrew J. Mullinax were only served. The sheriff returned *non est inventus* as to the other defendants.

Upon the trial plaintiffs offered and read in evidence the exemplification of the record from California where the judgment was rendered. The following is a copy of said judgment:

“ A. Sands & Co. vs. A. Howell & Co.)	March 8th, 1852. The plaintiff in this action brings his action for the recovery of a min-
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ing claim and damages of five hundred dollars. Complaint filed on the eighth day of March, 1852. Summons issued and made returnable on the 13th instant, and given to Moses, constable. Returned as served, on five of the defendants, by copy. The parties appeared by their counsels; E. P. Hawes for the plaintiffs, and A. J. Buckner for defendants. On motion of defendant's counsel, trial adjourned until the 22d day of March. Now come the parties by their counsels on the day appointed by me to try the case. Defendants called for a jury. Venire issued and given to Moses, constable, who returned the following named persons as a jury to try the case: G. W. Bond, H. S. Crane, D. B. James, J. W. Misner, John A. Cardewell, and Moses A. Eldrige. The jury being sworn, and after hearing the evidence on both sides, and the argument of counsel, retired in charge of a sworn constable, and returned the following verdict: "The jury in the case, Shands & Co. vs. A. Howell, Rufus Howell, Phillip Howell, Phillip Stonecipher, Joberry Mullinax, Thomas Thomson, Thomas Phillips and Andrew Mullinax, defendants, do find a verdict against defendants in damages to the amount of three hundred and seventy-five dollars, and that plaintiffs have restitution of his claim." (Signed by the jury.) "It is considered by the Justice that the damages be laid at five hundred dollars, and the defendants fined one hundred dollars, and the plaintiffs have execution for their debt and costs laid at the following: The judgment \$500 00; fine, \$100 00; Justice's fees, \$30 50; witnesses' fees, \$144 00; constables, \$26 00; jury, 15 00. Appeal by defendants; confirmed May the 3rd, 1852, by the county court—court costs, \$36 00. Execution issued May 4th, 1852, returnable in twenty days. Returned with the following endorsed upon it: 'Sold mining claims and fixtures for \$380 00. Moses, constable, the 5th day of July, 1852. S. L. Crane, J. P.'

Shands & Co. vs. Howell & Co.

Transcript of the docket made out and given to Shands, plaintiff, October the 4th, 1852, for the balance \$503 50.

(Signed,)

S. L. CRANE, J. P.

State of California, }
County of Eldorado. }

A. Howell et al., appellants, } In the county court,
vs. } in and for said county.
A. Shands et al., defendants. } May 3th, A. D. 1852.

Now on this day came A. Shands and J. Robertson, respondents by their attorneys, Robertson & Howell, and file herein their motion to dismiss said appeal, in which the said A. Howell, Rufus Howell, Phillip Howell, Philip Stonecipher, Joberry Mullinax, Thomas Thomson, Thomas Phillips and Andrew Mullinax, are appellants, and the court being advised in the premises: It is ordered and adjudged that said appeal be dismissed, and the judgment of the court below affirmed, and it is further ordered that said respondents have and recover of said appellants their costs and charges, to-wit: \$30 00 in their behalf expended, for which let execution issue. It is further ordered that the court below award to respondents execution upon the judgments rendered by him, and for the costs of his, the said Justice's, court."

The testimony being closed on both sides, the presiding judge, amongst other things, charged the jury, "that the judgment sued on and offered in evidence was good, against all the persons named in it who were summoned, or who appeared in person or by attorney, and defended the suit in which it was rendered. In other words, against all who had notice of the suit. That if the record sued on showed that there were eight persons sued, and that the constable returned that five of the persons sued were served with summons, without specifying who they were, it devolved on the plaintiffs to prove that Andrew Howell and Andrew Mullinax, the defendants in the case

before this court, were served with summons, or had notice of the pendency of the action in California, in which the judgment was rendered, otherwise they were not affected by the judgment."

Counsel for plaintiffs called the attention of the court to the entry in the record, as follows: "The parties appeared by their counsel, E. B. Howes, for the plaintiff, and A. J. Buckner, for the defendants," and requested the court to charge the jury that the entry was evidence to authorize them to presume that Andrew Howell and Andrew Mullinax, the defendants, were served with process, or had notice of the suit. The court refused to charge as requested, but charged the jury, "that that entry only authorized a presumption that the persons who had been served appeared, and did not authorize them to presume that these particular defendants, Howell and Mullinax, appeared or had notice of that case. To which charge and refusal to charge plaintiffs excepted.

The jury found for the defendants, and plaintiffs moved for a new trial, on the following grounds:

1st. Because of newly discovered evidence.

2nd. Because the court erred in holding and charging that it was necessary for plaintiffs to prove that Howell and Mullinax were served with process, or appeared and defended the suit in the State of California.

3rd. Because the verdict was contrary to the evidence.

The court refused the motion for a new trial, and plaintiffs excepted and assigned said decision as error.

IRWIN & LESTER, and BOYD, and WALKER, for plaintiffs in error.

JAMES R. BROWN, *contra*.

By the Court.—McDONALD, J., delivering the opinion.

The record shews no diligence on the part of the plain-

tiffs before the trial, to ascertain the evidence which they claim to be newly discovered. The proceeding shews that, on the contrary, they did not consider evidence to that point necessary to their cause.

We think, however, that there is enough in the exemplification of the judgments from California, to make out a *prima facie* case against the defendants who are sued in this case. It is true there were eight defendants in the cause in California, and the officer returned service on five of them only. The exemplification of the proceedings from California shew that the *parties*, (no doubt in this place meaning plaintiffs and defendants,) appeared by their counsel. It shews further that the defendants called for a jury. A jury was summoned, empaneled and sworn, and rendered a verdict. The names of all the defendants, eight in number, are set out in the verdict, and the jury proceed to say that they find a verdict against the defendants. In the proceedings to dismiss the appeal in the county court, all the defendants, eight in number, are stated to be appellants. We think there is enough in the record to authorize a presumption that the defendants all appeared and defended, and the defendants to this case among them. It is by no means conclusive on them however. If it can be shewn by them that they were not served, and did not appear and defend, they may be allowed to do it. But the onus is on them.

Judgment reversed.

GRESHAM vs. RICKENBACHER.

1. The Legislature has constitutional power to pass an act vesting property before office found, of an illegitimate person who died intestate, leaving no widow, or child, or mother, or illegitimate brother or sister, in half brothers and sister born in lawful wedlock, of the same mother.
2. When the inferior court are required by statute to adjudge the expenses incurred by the escheator, in securing escheated property, they are not bound to direct an issue of fact to ascertain such expenses.
3. If the inferior court be required to determine such expenses, their judgment or award is final and conclusive on the parties.
4. If counsel have been employed by the escheator, a reasonable allowance should be made them by the court.

Certiorari, from Merriwether county. Decision by Judge BULL, at February Term, 1859.

Jacob Stroman was an illegitimate. After his birth, his mother married Samuel E. Rickenbacher, by whom she had children. Jacob died in Merriwether county in 1854, intestate, without a wife or lawful issue, and the children of Rickenbacher by his mother, his half brothers and sisters, were his nearest of kin.

Temporary letters of administration on his estate were granted by the ordinary of Merriwether county to one Pyron, and afterwards permanent letters to one Mitchell. Steps were taken, counsel consulted and employed, and some proceedings had, by David C. Gresham, the ordinary and escheator of said county, to escheat his estate; which amounted to about thirty thousand dollars. Pending these proceedings, the General Assembly passed an act to prevent said estate from escheating, and to vest the same in the said half brothers and sisters of deceased, and their representatives. Said act provided, among other

things, that the escheator be allowed to retain a sufficient amount of said estate to pay expenses already incurred by him in securing said property under the escheat laws, and which expenses were to be passed upon and adjudged by the inferior court of said county.

The escheator was served with a rule or notice to render and present his account for expenses thus incurred to the inferior court of said county, as provided by said act.

To this rule the escheator answered, that said act was unconstitutional, as well as the act of 5th March, 1856, and being thus unconstitutional and void, he ought not to be required to comply with its terms and provisions in rendering the account called for.

Subject to this objection, respondent answered, that in securing said estate under the escheat laws of the State, he was resisted by movents and forced to employ counsel; that he did employ Edward Y. Hill and Benjamin H. Hill, attorneys at law, promising to pay to each one thousand dollars, to be paid out of the property to be escheated. He also corresponded with F. H. Cone, Esq., and promised to pay him a thousand dollars out of the estate for his services in the case. The Messrs. Hill rendered services in preparing arguments against the constitutionality of said act, before its passage, and Judge Cone furnished various written opinions to respondent in relation to escheating said estate, but no further service; that he, as escheator, has been put to considerable trouble in relation to said estate, and he submits to the court to allow him such compensation as they deem fit and proper; that the estate is worth about thirty thousand dollars.

The inferior court allowed respondent, as escheator, one hundred dollars on account of expenses incurred, but refused to allow anything for counsel fees.

To this decision respondent excepted, and sued out a *certiorari* to have said judgment reviewed and reversed.

Upon hearing the *certiorari*, and the return made thereto,

by the inferior court, and after argument, the presiding judge dismissed the same, and affirmed the judgment of the inferior court. To which decision respondent excepts, and assigns the same as error.

B. H. HILL, for plaintiff in error.

HIRAM WARNER, *contra*.

By the Court.—McDONALD, J., delivering the opinion.

In 1857, (Acts 296) the Legislature passed an act that the estate of Jacob Stroman, deceased, who was an illegitimate person, and had died intestate, leaving no widow, or child or children, or mother, or illegitimate brother or sister, should not be escheated for the benefit of the public, under the escheat laws of this State, but that it should be vested in the half brothers and sister of the said Jacob Stroman, who, it appears from the preamble of said act, were born in lawful wedlock of the body of the same mother, after her inter-marriage with Nicholas Rickenbacher. Prior to the passage of this act, the plaintiff in error had initiated proceedings, as escheator of Merriwether county, to have the property of said Stroman escheated. The vested right of any individual, corporation or county, then existing or theretofore acquired in the estate of said Jacob Stroman, was protected by the said act.

The said act further declared that the public escheator of said county should be allowed to retain a sufficient amount of said estate to pay expenses already incurred by him in securing said property, under the escheat laws, all of which were to be adjudged by the inferior court of Merriwether county.

At the April Term, 1858, of the inferior court of said county, the said court passed an order *nisi* requiring the plaintiff in error, as public escheator of said county, to

present and exhibit to the court, during that term, a just and true account of all expenses incurred by him as such public escheator, prior to the passing of said act, in securing the property of the said Jacob Stroman under the the escheat laws of this State, duly vouched and authenticated, that the court might consider and adjudge the same, under the provisions and requirements of said act, or show cause why he should not do so.

The escheator responded to said order, and insisted in his answer:

1st. That the act under which the court granted the order is unconstitutional and cannot be enforced;

2d That the State of Georgia had no interest in Jacob Stroman's estate, and relinquished nothing to the persons claiming under the act;

3d. That Jacob Stroman had departed this life prior to the passing of the act of 1857, and an inventory of his property had been made out and returned under the escheat laws; that his estate had vested in the county of Merriwether, under the laws of the State, and could not be divested under the act in question;

4th. That the act reserved the vested right of any individual, corporation or county in the said estate, and that it had previously vested in the county of Merriwether.

The respondent then proceeds to state his services and responsibilities as public escheator, and the commissions to which he would have been entitled if the property had been escheated, and that the estate was worth \$30,000; that he had been forced to employ counsel; that he had employed three counsel at a fee of one thousand dollars each, to be paid out of the property of said estate; that one of the counsel had given a written opinion, and the other two had rendered professional services in court, and had prepared arguments in opposition to an act introduced into the Legislature, at the session of 1855-6, discussing its constitutionality by which means it was defeated.

On considering the answer of respondent and hearing the evidence, the inferior court awarded him one hundred dollars for expenses, overruling all other objections to the proceedings under the act of 1857.

The plaintiff in error excepted to the decision of the inferior court, and carried the cause to the superior court by writ of *certiorari*, to have the errors corrected. He complains, in his petition, that the inferior court allowed him an insufficient sum for his expenses, and made him no allowance for counsel fees; he complains further, that the court refused to direct an issue of the facts of the case to be made up and submitted to a jury, and annexes a statement of the decisions of the inferior court to his petition, with his exceptions thereto. Among these decisions is one that said court determined the act of 1857 to be constitutional.

The judge of the superior court sustained the inferior court in all its rulings, and his judgment on the *certiorari* is excepted to, and makes this case.

1. It is objected that the act of 1857, which vests the estate of Jacob Stroman in his half brothers and sister, is unconstitutional. The act must be supposed to have been passed at the instance of those benefitted by its enactment, and on the assumption by them that, without it, they would have no interest in the estate. No one else appears to claim it. Stroman died intestate. The State as sovereign, or representing the sovereignty of the people, was his ultimate heir, and succeeded to his estate. The sovereign authority having the right of inheritance or escheat, had the power to relinquish it and vest it elsewhere, provided it had made no irrevocable or irrevocable regulation respecting this estate, or estates of like description generally. Our statutes respecting escheats are based upon the principle that the State is the ultimate heir in such cases. They recognize the higher claim of the heirs proper of the deceased, and others who may

claim under him. They require the escheator to advertise for his heirs after the inquest. After the property was sold, and the money arising from the sale was paid into the treasury, (during the existence of the law which required it to be paid there,) persons were allowed twenty-one years to establish their claim to escheated real estate, and five years to escheated personal property; and upon establishing such claim, they were entitled to a draft on the treasury for the amount paid therein. During all this time the State did not insist upon an absolute right to the property, for it held the proceeds in trust for those whose superior right it recognised. But the State ever maintained the right in itself when no claimant appeared. But the right of the State is not established until after inquest and office found. After such right becomes complete, the State may unquestionably bestow the property or proceeds, by proper enactments, on any persons whom the Legislature in its wisdom may consider entitled to it on principles of natural justice, without usurping unconstitutional power. It is equally unquestionable that the Legislature may, while its right remains uncertain, doubtful and unsettled, relinquish that right, whatever it may be, and vest it in such persons as it may choose to indicate.

It is said, however, that the Legislature has already disposed of all its right and property to escheated property, and that, inasmuch as Stroman departed this life prior to the passing of the act of 1857, rights had vested under a general statute which this special act could not divest. The general statute referred to is the act of 1886, (Cobb, 255,) the first section of which declares that "all moneys arising from the sale of escheated property in the several counties in this State, shall vest in and become a part of the fund of said counties respectively." If the principle contended for be tenable, it cannot apply to this case, because there had been no inquest; there had been no find-

ing on an inquest; there had been no sale of property; and there was no *money* arising from the sale of the property to *vest* in the county. It was all yet under the control of the authority of the State. If the money had been paid over and become a part of the county fund, under the first section of the act, it was still subject to be drawn therefrom under the third section of the act of 1836, within the time and under the circumstances that it might have been drawn from the treasury under the law to which I have already adverted. We think, therefore, that the Legislature in passing the act of 1857 transcended no constitutional power.

2. It was objected on the hearing of this cause before the inferior court, that evidence could not be introduced to controvert the answer of the escheator, until an issue of fact was made thereon. It is replied, that there was no controversy respecting any matter of fact arising upon the answer. The act under which the proceeding was had, referred the settlement and adjustment of the expenses incurred by the escheator to the inferior court. To form a judgment in regard to what was right, they were obliged to hear evidence. There was no occasion to make an issue of fact and submit it to a jury, unless the court felt itself at a loss to decide some matter of fact and they desired to have their conscience informed by a jury. They certainly had no right to delegate to a jury the power of settling the account of expenses incurred by the escheator. The statute gave the court and the court alone that power.

3. The amount of expenses allowed the escheator is made a ground of complaint and exception. It is insisted that more should have been allowed him. That matter rested solely in the judgment and discretion of the inferior court, and this court has no authority to interfere with their discretion by increasing or diminishing the amount fixed by them, or by setting aside the award made by

them. The statute makes them the sole arbiters of that matter.

4. The inferior court, on the subject of the counsel fees, determined that no allowance could be made for them. In that matter we think that they misconstrued the law and their duty. If they put their judgment on the ground that by the contracts made between the escheator and the attorneys employed by him, their fees were conditional, to be paid from the proceeds of the sale of the property, and that nothing could be paid because the Legislature arrested the proceedings to escheat the property, and the sale could therefore never be made, they erred in their judgment. They had already given a different interpretation in awarding expenses to the escheator; for, by the general law of escheats, he was not entitled to pay except by commissions on the amount of the sales of the escheated property, and the commission allowed was to make him compensation and to pay all expenses incurred. But the Legislature, in giving the defendants in error the property, had the right to prescribe the terms on which they should have it. They take it under that grant, and they take it subject to the charges imposed on it in the grant. It cannot be presumed that the general assembly were not apprised of the law applying to ordinary cases, viz: that neither compensation nor expenses were payable but from the sale of the escheated property. On the contrary, the act shows that they had that matter in their mind, and therefore made it a condition of the grant that the expenses already incurred by the escheator in securing the property should be paid. The amount of expenses were not to be determined by the interested judgment of the escheator, but it was left to the determination of a disinterested and impartial arbiter, capable of forming a correct judgment. It was urged in the argument that the escheator did not secure the property, and that therefore he is not entitled under the act. He initiated proceedings

for that purpose, and we hold that to be the meaning of the act.

We reverse the judgment of the court below on the ground, that in our judgment the presiding judge should have sustained the *certiorari* to the inferior court, and reversed its decision that counsel fees were not allowable, and that that court should proceed with an inquiry into that matter and make a reasonable allowance for these expenses.

Judgment reversed.

JOBE vs. THE STATE.

Notwithstanding the court has pronounced its judgment in a criminal case, it is in the power of the court to change it before the same has been entered upon the minutes, especially when the court has been requested by the defendant to re-consider its sentence, with a view to its modification.

Indictment, from Catoosa county. Tried before Judge CROOK, at November Term, 1858.

James S. Jobe, the plaintiff in error, was indicted for keeping and maintaining a lewd house. Upon the return of the verdict of guilty, the presiding judge directed the solicitor general to take an order that defendant be fined twenty-five dollars, and imprisoned thirty days. The presiding judge, at the request of defendant's counsel and one of his securities, to increase the fine and remit the imprisonment, and also not to permit the sheriff to place the defendant in jail that night, stated in open court that he should not interfere with the sheriff in the discharge of

his duty, but that he might do as he pleased in the matter, knowing his duty; but that he would consider the request to remit the imprisonment until morning.

On the following morning, the defendant being in court, the presiding judge stated that, upon reflection, he would not change the order he had given in relation to the sentence the evening previous. The defendant in the meantime was not confined in the jail, the order of the court not having been signed by the judge nor entered on the minutes of the court.

On the 20th November, the last day of the term of the court, the sheriff announced that the defendant had escaped. The court ordered the sheriff to call defendant, who failing to answer or appear, the court ordered the solicitor general to forfeit defendant's bond, and to draw an order fining defendant twenty-five dollars, and that he be imprisoned six months in the common jail of the county, if the sheriff deemed said jail sufficient to detain him; if not, that he be sent to the jail of Whitfield county.

To which order and sentence defendant's counsel excepted.

SPRAYBERRY & THATCHER, for plaintiff in error.

Sol. Gen. JOHNSON, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

The only question in the case is, whether, before judgment of the court in a criminal cause is entered upon the minutes, and while it is yet under the control of the court, it is competent for the judge to change it?

We apprehend there can be no doubt of the power of the court to do so, especially when, as in this case, the court is solicited by the defendant to re-consider the sentence which it has orally pronounced, with a view to its modification.

Judgment affirmed.

WALKER *vs.* FIELDS.

1. A *mill-wright* may give his *opinion* as to the skillfulness of work done on a mill, but not a *mill*.
2. An expert may give an opinion upon the *facts* testified to by other witnesses, but not upon *their opinions*.
3. It is the right of the defendant to introduce sur-rebutting testimony, although it be cumulative only.

Debt, from Henry county. Tried before Judge CABANISS, at April Term, 1859.

This was an action by William B. Fields, for another, against Andrew W. Walker, on a promisory note given in part payment for the building of a merchant mill. The defendant filed his pleas of partial and entire failure of consideration, to-wit: That said mill was not built according to contract, and that the machinery was inefficient and wholly unfit for the purposes contemplated; the contract being set forth in the brief of evidence accompanying the record. Defendant proposed to prove by Dawson, defendant's first miller, in addition to the improper construction of the machinery, that in consequence of the want of durability and efficiency in said machinery, the defendant had been damaged fifteen hundred dollars. This testimony was objected to by plaintiff's counsel on the ground that Dawson was no mill-wright, and his opinion of the damages sustained by defendant was, therefore, inadmissible, unless he would state the facts upon which his opinion was predicated. The court sustained the objection, and counsel for defendant excepted.

Defendant, after having read the contract, and the depositions of Dawson, Key, and Edge, proposed to prove by Thomas A. Adams, a mill-wright, the difference between

a mill built according to the contract and the mill built by Fields, as proven by the witnesses.

Counsel for plaintiff objected, on the ground that witness could give his opinion only upon the *facts* proven by the other witnesses and not upon their opinions. Defendant's counsel insisted that they, (the contract and the testimony of the witnesses,) were enough to enable Adams to give a correct opinion as to the damages sustained. The court ruled that Adams could testify only from the facts proven, but could not testify as to the damages sustained by defendant from the opinions of the witnesses. For instance, when the witnesses testified to a fact, such as the length and so forth of the shaft, then the witness Adams might give his opinion as to the difference between the value of the thing proven and one properly constructed, and counsel for defendant excepted.

After plaintiff had read his note to the jury, and the evidence of the defendant had closed, plaintiff, in rebuttal read several sets of interrogatories going to prove that the mill was built according to contract. Defendant then offered to introduce James McNeely, E. L. Gresham, Daniel Grafton and James Smith, to prove that in consequence of the improper construction of the bolting chest, &c., some customers would get twenty pounds of flour and others sixty. To which plaintiff's counsel objected, upon the ground that the evidence was merely cumulative of what had been previously proven by defendant, and therefore, was inadmissible. The court sustained the objection and ruled out the evidence, and counsel for defendant excepted.

The jury found for the plaintiff the balance due on the note.

Whereupon defendant tenders his bill of exceptions, assigning as error the rulings and decisions above excepted to.

DOYAL & NOLAN, for plaintiff in error.

CLARK & LAMAR, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

1. The court, so far as the bill of exceptions shows, made no decision as to the admissibility of Dawson's testimony. Had this evidence been rejected, as it probably was, it would have been right. It was a mere matter of opinion; and he was not a *mill-wright* but a *mill* only.

2. We concur with the court that Thomas A. Adams, as an expert, could only give an opinion upon the *facts* testified to by Dawson, Key and Edge, and not upon their *opinions*.

3. The rejection by the court of the sur-rebutting testimony of McNeely, Gresham, Grafton and Smith, was wrong. True, it was cumulative; but the defendant could not have anticipated the proof offered by the plaintiff in rebuttal to establish the fact that the mill was built according to contract. It behooved him, therefore, to support his defence by additional evidence, and he had a right to do so, especially as it does not appear that any of the plaintiff's witnesses had left the court; or that he was hurt by the direction given to the testimony.

Judgment reversed.

CANTRELL vs. ADDERHOLT.

If stock be destroyed on *uninclosed* river bottom lands, the trespasser is liable to the owner of the *castle* or hogs for the injury; and it is immaterial whether the injury be inflicted by the master, or his slaves.

Trespass, in Campbell superior court. Tried before Judge HAMMOND, at September Term, 1858.

This was an action of trespass brought by Adderholt against Cantrell, for killing plaintiff's hogs.

It appeared on the trial, that plaintiff and defendant had farms on opposite sides of the Chattahoochee river, in the county of Campbell—that next to the river there was no fence around the fields, and plaintiff's hogs would swim across the river from his field into defendant's field on the opposite side, and eat and destroy his corn, &c., then growing or ungathered. Defendant's negroes would drive them out, and in doing so, killed a good many—this occurred frequently; and not only defendant but other persons on the same side of the river with him, were much annoyed and injured in the same way by plaintiff's hogs.

After the testimony on both sides had closed, the court charged the jury, that the defendant was not liable for the killing of the hogs by his negroes, unless he had ordered them to do so, or unless they, in the execution of his orders, acted so negligently as to kill them. That if it was the voluntary act of the negroes unauthorized by their master, he was not liable.

The jury found for the plaintiff forty dollars. Whereupon defendant moved for a new trial upon the following grounds:

1. Because the verdict was contrary to the charge of the court.
2. Because the verdict was contrary to law, and the evidence, and without evidence and against the right of evidence.
3. Because the court failed to charge the jury, that if the plaintiff had notice that his hogs were injuring defendant's property, and that from the act of God, or other

unavoidable cause, it was impossible to fence against them, except at an unreasonable expense to defendant, then it was plaintiff's duty to pen his hogs, and if he failed to do so, defendant had a right, if necessary to save or protect his property, to kill them.

4. Because the court omitted to charge the jury that if they believed from the evidence that plaintiff's hogs were mischievous and he knew it, then it was his duty to have kept them up at such seasons as they could do damage to the neighboring plantations; and if permitted to run at large, and they were killed in order to prevent them from seriously injuring the property of another, that he was not entitled to recover for such killing.

The court refused to grant a new trial, and defendant excepted.

TIDWELL & WOOTTON, for plaintiff in error.

TUGGLE & BUTT, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

The act of 1759, (Cobb, 18,) for better regulating fences in the province of Georgia, and which remains in full force to this date, is too plain and imperative to admit of doubt or tolerate evasion. The fence therein required to be erected, applies to "any garden, orchard, rice ground, indigo field, plantation or settlement;" and there is no exception in favor of river-bottom lands or any other. We dare not make any.

The act further provides that if any damage shall be committed by stock on grounds not thus enclosed, the owner shall not be liable therefor; and on the other hand, if any person shall kill, maim, hurt or destroy, any stock breaking into grounds not fenced as the law prescribes, or cause the same to be done, the person so offending shall answer and make good the injuries to the owner.

Logan vs. Sumter.

As to the doctrine contended for, that the master is not liable for the trespass of his slaves, it was submitted so fully to the jury in behalf of the defendant that he cannot complain. For ourselves, we do not doubt but that he is responsible for such an injury as this. It may be much more expensive and troublesome to enclose river bottom lands than others. Still, it is not impossible. But whether it be or not, absolution must come from the other departments of the government. The courts have no power to dispense it.

Judgment affirmed.

LOGAN vs. SUMTER.

1. In a suit against the assignee of an execution by a defendant, to recover back money paid upon it, the exemplification of a judgment and an execution against another defendant for the same debt, by which it appears that the plaintiff, from whose representatives the assignee derived title, had been paid the debt, is admissible in evidence ; and so is the exemplification of the judgment and the execution against the defendant on which the money was paid.
2. A defendant who has paid an execution on which he is not liable, may recover back the money—he having paid it under the belief that he was liable.

Debt, from Floyd county. Tried before Judge HAMMOND, at August Term, 1858.

The facts of this case are as follows:

In 1833, T. W. A. Sumter made his note for a thousand dollars, payable, sixty days after date, to the order of James M. Sumter. The note was endorsed by James M. Sumter, and finally by Jacob Stroup, to whom it had

been endorsed, to Benjamin F. Patton. The parties at the time, all resided in Habersham county. Patton brought separte suits on the note against the maker and endorsers, and in 1834 or 1835, recovered judgments respectively against them, and issued executions. Stroup, the last endorser, paid off the judgment against him in full, but Patton still held open the judgment against James M. Sumter, the first endorser. After Patton's death, this execution against Sumter, was sold by his administrators as an insolvent paper, and by subsequent transfer came into the hands of James L. Logan. Logan, in 1853, applied to Sumter, who had removed to Floyd county, for payment of this execution, which, at the time, was dormant, and received from him, in notes and furniture, three hundred and fifty dollars, in full satisfaction of the same.

Sumter now brings this action against Logan to recover back the money thus paid, and to which he avers that Logan had no right or title, and that the same was obtained from him wrongfully, fraudulently, and without consideration.

Defendant pleaded the general issue; and that he was a *bona fide* purchaser of said judgment and execution for valuable consideration.

Upon the trial, plaintiff tendered in evidence an exemplification, from Habersham superior court, of the judgments and executions there by Patton against Stroup and plaintiff, with the entries and returns thereon. The defendant objected to their introduction as irrelevant, and as judgments rendered in cases between different parties, from those now before the court. The court overruled the objection and admitted the evidence, and defendant excepted.

After plaintiff closed, defendant moved for a non-suit, on the ground that the evidence did not make out a case of legal liability on his part to plaintiff. The court re-

fused the motion for a non-suit, and defendant excepted.

The defendant introduced no evidence.

The court instructed the jury to find for the plaintiff, and a verdict was rendered in his favor for three hundred and fifty dollars, besides interest and cost.

Whereupon defendant, by his counsel, tenders his bill of exceptions; assigning as error the aforesaid rulings and decisions.

D. R. MITCHELL, for plaintiff in error.

UNDERWOOD & SMITH, *contra*.

By the Court.—McDONALD, J., delivering the opinion.

The action of the court below was brought to recover money which, it was alleged, was paid without consideration. The plaintiff in error became possessed of an execution, issued on a judgment obtained in Habersham superior court, in favor of B. F. Patton against the defendant in error, on the indorsement of a note of one thousand dollars, made by T. W. A. Sumter, and indorsed by several persons, and among them Jacob Stroup, who was the last indorser. The maker and endorsers were all sued in separate actions by Patton, the holder; and Jacob Stroup, the last indorser, paid the entire debt, all which appears in an exemplification of the case and an execution against Stroup. B. F. Patton died, and his administrators finding amongst his papers the execution, open and unsatisfied, against Sumter the defendant in error, sold it as an insolvent or doubtful debt. Through that sale the plaintiff in error became the holder of it, and under it received the money sought to be recovered back. Whether he is the holder under an administrator's sale or by transfer of the plaintiff himself, he is the assignee of it, and is authorized to collect it in as full and ample a man-

ner as the plaintiff could have done, if there had been no transfer or assignment of it. (Cobb's new Dig., 699.) He stands in his place and can have no better or higher claim. It is always legitimate, then, in controversies arising between the assignee of an execution and the defendant, to enquire into the right of the plaintiff against the defendant; and whether, if it had not been transferred, the plaintiff could have collected it.

1. On the trial of the cause in the court below, the defendant in error, who was plaintiff in that court, offered in evidence the copy of records, from the superior court of Habersham county, of the judgments in favor of B. F. Patton against Jacob Stroup, and against the defendant in error, and the executions and entries thereon, issued on said judgments, to the admission of which the plaintiff in error, by his counsel, objected, on the ground that they were "irrelevant and improper," not being between the parties litigant in the cause. The execution and the exemplification of the judgment on which it was founded, against the defendant in error, was admissible, for it was the subject of the contract on which the money was paid by the defendant to the plaintiff in error. The other record and execution were admissible as shewing the rights of the plaintiff in *fi. fa.* against the defendant in error at the time of the transaction between the plaintiff and defendant in error. Again, the plaintiff in error claimed through B. F. Patton, the plaintiff in *fi. fa.*, and stood precisely in his place, and "the declarations of an intestate are admissible against his administrator, or any other claiming in his right." (1 Greenleaf Ev. §189.) This does not differ from the ordinary case of a claim, when the claimant is allowed to prove the payment of an assigned execution, while it was in the hands of the original plaintiff, by any evidence which would be admissible, if that plaintiff had not transferred it.

2. After the evidence was closed, the plaintiff in error

moved in the court below for a non-suit, on the ground that the evidence of the plaintiff did not make out a case of legal liability by the defendant to the plaintiff. The court overruled the motion and this decision is assigned as error. It was contended before us, that in the original transaction between the plaintiff and defendant in error, there was a sufficient consideration to support the contract, and that, if there was, the plaintiff in the court below ought not to recover. This argument seems to have been sustained on the assumption, that the main ground on which the plaintiff relied for a recovery was, that the execution was, at the time, dormant and could not be enforced against him. If that had been the *only* ground of objection to the execution, the consideration, unquestionably, would have been sufficient, for it might have been revived against him. But the plaintiff in error had no title. He derived the execution from a party who had been paid, and who, had he been the plaintiff in a proceeding to revive the judgment, must have been defeated. The plaintiff in error could occupy no better position; and if, in a proceeding of that sort, he must have been defeated, either because he had no title, or because the execution had been paid, the defendant in error was not liable to him in any respect, and all that he paid for a discharge from the execution, believing that he was liable on it, was a payment without consideration, and he is intitled to recover it back.

Judgment affirmed.

LEACH vs. ROGERS.

R. agrees to sell to L. a place known as the Brick Yard place, and to receive pay in work. L. does the work, and R. agrees to make a title, but afterwards uses the property and conveys it for his own purposes. L. has a right to sue R. and recover for the work.

Complaint on account, in Floyd superior court. Tried before Judge HAMMOND, August Term, 1858.

This was an action by Leach against Rogers to recover two hundred and seventy dollars and fifty one cents, on an account.

The facts of this case are about as follows :

The plaintiff bought a place in the city of Rome, known as the Brick Yard place, from defendant, for three hundred and fifty dollars, and paid for the same in work done for defendant. After this, but before defendant had made titles, plaintiff exchanged the brick yard place for a tract of land in the country, with one E. P. Treadaway. Treadaway executed a deed to plaintiff for the land which he let him have, and called on Rogers for titles to the brick yard place, but Rogers put him off and never executed titles to him, nor to Leach. Leach subsequently removed from the county, (Floyd,) and under an attachment sued out against him, the land which he got from Treadaway was levied on and sold. At the sale, Treadaway gave notice that he had a lien on the premises for \$420, being the estimated purchase money, he never having obtained title for the brick yard place, which Leach was to let him have in exchange. The land was sold and bought by Rogers for about one hundred dollars, and he afterwards, upon Treadaway releasing his vendor's

lein, executed to him titles for the brick yard. And Leach now sues to recover from Rogers the amount of his account for work &c., and which was to go in payment for the brick yard, but the title to which he never obtained.

Upon this state of facts, the court, on motion of defendant's counsel, ordered a non-suit, and plaintiff excepted.

T. W. ALEXANDER, for plaintiff in error.

UNDERWOOD & SMITH, *contra*.

By the Court.—McDONALD, J., delivering the opinion.

The plaintiff had purchased the brick yard place of the defendant, and paid him for it in work, and the defendant, more than once agreed to make a title to one of the witnesses, Tredaway, to whom the plaintiff had exchanged the brick yard place for other land. The value of the land for which it was exchanged was four hundred and twenty dollars. The price paid for the brick yard place in work, was three hundred and fifty dollars. The plaintiff removed from the county, and the land which he had received in exchange for the brick yard place, was attached as his property and sold by the sheriff. Tredaway, not having been able to obtain from Rogers a title to the brick yard property, which he acknowledged the plaintiff had paid him for, gave notice at the sheriff's sale that he had a vendor's lien of four hundred and twenty dollars, on the land. It was sold subject to this lien, and the defendant, Rogers, bought it at the price of \$103. The lien claimed by Tredaway, resulted from the refusal of the defendant, Rogers, to execute the title to Tredaway, for the brick yard place. If he had executed that title, there would have been no lien, and if there had been no lien, there could have been no notice of a lien at the sheriff's

sale, and if there had been no notice, the plaintiff's land must have sold for five hundred and twenty-three dollars, and he would have had, or been entitled, to that sum for his land. As it is, he received a benefit amounting to only one hundred and three dollars, and the defendant never paid him for his work. After the defendant purchased the land he agreed to make Treadaway a deed to the brick yard place for the vendor's lien which he held on the land, and to extinguish that, Rogers made a title to Treadaway of the brick yard place, which, according to the evidence, the plaintiff having paid him for it, he held in trust for, and was bound to convey to the plaintiff. Treadaway had put an end to his claim in the brick yard property by giving notice of his vendor's lien; by that act the right to a title reverted to the plaintiff, Leach. I see no reason myself, why he could not enforce his right in a court of chancery and compel a specific performance of that contract as the parties all had notice. But he, unquestionably, has the right to affirm all these proceedings by the parties, and claim payment from Rogers of his account.

We think the cause ought to have gone to the jury. It is clear the account had never been paid. The judgment of the court below must be reversed.

Judgment reversed.

FEARS vs. LYNCH.

The negro of a *cestui que* trust is sold, and, with the proceeds of the sale, land is purchased, the title of which passes to the *cestui que* trust: held, that the *cestui que* trust cannot retain the land and recover back the negro.

In equity, in Floyd superior court. Decision on demurrer, by Judge HAMMOND, March, 1859.

This bill was filed by Thomas Lynch, of the State of Alabama, against Peachy A. Fears, and in substance, alleges, that in 1853 complainant was merchandizing in Monroe county, Mississippi, and was sent for by Hansford J. Fears, who was at the time sick in bed, and was a stranger to complainant, who had recently commenced business in that neighborhood—that complainant went, and Fears informed him that the land upon which he then lived, he had purchased from Judge Morgan, and that the last payment was then due, and Morgan required payment, or the land to be given up, and proposed to sell complainant a negro boy named George, about eight or nine years old, in order to raise money to save his land. Complainant at first declined to purchase the negro, until his sympathies were excited by the appeals of Mrs. Peachy A. Fears, the wife of said Hansford, when he agreed to take the boy at five hundred and fifty dollars—five hundred dollars to be paid to Judge Morgan, and fifty to be paid to Fears. He inquired of both Fears and wife whether there was any incumbrance on the boy, and they both answered that there was none, and that the title was good, and was in the said Hansford J. Fears. That he took a bill of sale for said negro, and required both Mr. and Mrs. Fears to sign it, Fears at his wife's request signing her name for her, she saying that she could not write, which bill of sale has been lost. That soon after, complainant paid to Judge Morgan five hundred dollars, which was the entire purchase money of said lands and not a part as complainant had been informed by Fears, and that he paid to Fears fifty dollars, the balance of the purchase money of said negro.

The bill further alleges that at the time complainant

purchased said negro, he had no notice that there was any encumbrance upon him, and believed that the title was in the said Hansford J. Fears. After the payment of said sum of five hundred and fifty dollars by complainant, the deed of conveyance of said land from Morgan was made to Mrs. Fears and not to her husband, and of this he had no knowledge until after he had paid the amounts aforesaid to Morgan and Fears. That said land so paid for by complainant, is situated in the county of Monroe, in the State of Mississippi, and Mrs. Fears is still in the possession of the same, and which is worth twelve or fifteen hundred dollars. That at the time complainant purchased said negro, the title was in said Peachy A. Fears, under a deed of gift to her. That complainant sold said negro before he had any notice of such deed of gift; that Hansford J. Peachy died in 1858, and his wife the said Peachy A., afterwards brought suit against complainant for said negro, and recovered judgment for \$866 62½. That she has sent said judgment or a transcript thereof, to Floyd county in this State, and sued out an attachment thereon against complainant, which has been levied upon two lots of land belonging to him.

The prayer of the bill is that defendant be compelled to elect either to execute titles to complainant for the land in Mississippi, and which he paid for as above stated, or to enter satisfaction on her judgment so obtained against complainant for said negro; or that she be required, by a decree of this court, to sell said land and apply the proceeds to the payment of said judgment; and for an injunction to restrain her from proceeding with said attachment.

To this bill defendant demurred. The court overruled the demurrer and defendant excepted.

UNDERWOOD & SMITH, for plaintiff in error.

CHISOLM WADDELL, *contra*.

By the Court.—McDONALD, J., delivering the opinion.

It would be a gross fraud on the defendant in error, for the plaintiff in error to keep the land purchased with the proceeds of the sale of the negro, and then recover the negro back. The defendant in error was not compelled to make the defence set up in this bill to the action of trover for the recovery of the negro, or lose his remedy against the plaintiff in error for the conveyance of the land to him which was paid for with the money which he gave for the negro, or for such other relief as the court of chancery would afford him under the extraordinary course pursued by the plaintiff in error.

The bill must be answered.

Judgment affirmed.

FULCHER vs. FELKER.

A sells to B a tract of land at full valuation incumbered with a judgment lien, to satisfy which, the land is sold by the sheriff, leaving a surplus, after satisfying the principal interest and cost of the *fi. fa.* Upon a rule against the sheriff, and at the instance of A, *held* that B, the purchaser, and not A, was entitled to this balance.

Rule against sheriff, from Catoosa county. Decision by Judge CROOK, at November Term, 1858.

Jesse Felker, the sheriff of Catoosa county, under and by virtue of an execution in favor of Jacob Keiralf, against William Fulcher, levied upon and sold a tract of land as the property of the defendant, and there remained in his, the sheriff's hands, after satisfying the *fi. fa.* the sum of seven hundred and twenty-five dollars.

Fulcher, the defendant in *fi. fa.*, ruled the sheriff, to show cause why he should not pay over to him this balance in his hands.

The sheriff answered the rule and showed for cause, that the said fund was raised by a sale of land belonging to defendant at the date of the judgment, but which land was subsequently, and before the levy and sale, sold by defendant to Carroll A. Cloud, who was in possession of the same at the time of the sheriff's sale, and who became the purchaser at that sale for a sum or price more than sufficient to satisfy the said *fi. fa.* by the amount of seven hundred and twenty-five dollars. That said land had been conveyed to said Cloud by deed from Fulcher, as above stated, and the *fi. fa.* under which it was sold was the only one against Fulcher. That he, the sheriff, therefore permitted Cloud as the vendor and granted by deed from Fulcher, after paying up enough to satisfy said *fi. fa.* to retain the balance of his bid; and respondent is advised that after thus satisfying the said *fi. fa.* the surplus or residue rightfully belonged to Cloud.

Upon this answer the court discharged the rule, and counsel for Fulcher excepted.

SPRAYBERRY & THATCHER, CULBERSON, and WALKER, for plaintiff in error.

McCONNELL, *contra.*

By the Court.—LUMPKIN, J., delivering the opinion.

Can there be any doubt that Cloud, by going into a court of equity, would be decreed to retain the balance of the money for which the land was sold, after satisfying the principal, interest and cost of the *fi. fa.*? We apprehend not. The same principle should govern then in the decision of this motion. Cloud bought and paid Fulcher,

the defendant in execution, for the land. He went into possession. But it was incumbered by the older lien of the judgment. This he was obliged to discharge. Having done this, was he not entitled to hold on to the surplus of the sale? What claim had Fulcher to it? He had sold and conveyed to Cloud and received the full value of his property. Fulcher's deed is an order to the sheriff, executed in the most solemn form, to account with Cloud for the money in his hands. Cloud is entitled not only to retain this, but to sue and recover from Fulcher the amount that he has been compelled to pay for his use.

If Fulcher chose to traverse the return of the sheriff, and contest the title of Cloud, he had ample opportunity to do so. He not only tendered no issue, controverting the facts, but by his silence acquiesced in the truth of the sheriff's showing. The sheriff, it is true, failed to collect the \$725 at his peril. The facts of the case having justified him, he is protected.

Judgment affirmed.

WALKER vs. THE STATE.

When the sayings of a party accused of larceny, are admissible as evidence for him—

Indictment, for hog stealing, in Haralson superior court. Tried before Judge HAMMOND, October Term, 1858.

The plaintiff in error was indicted for hog stealing and found guilty. His counsel moved for a new trial on the following grounds :

1. Because the court erred in not permitting defendant to prove what he said in explanation of his possession of the hog, when found in his possession.

2. Because the court erred in refusing to allow defendant to prove the offer of James Plott to sell a lot of hogs to E. J. Newman, on Walsen creek, and the description he gave of their different marks, and why they were so marked.

8. Because the court erred in refusing to admit in evidence a conversation between James Plott and Henry Hill, in relation to the terms of the contract of the sale of certain hogs by Plott to Hill.

4. 5. Because the verdict was contrary to law, the charge of the court, and the evidence.

The court overruled the motion and defendant excepted.

BURKE & BLACK, for plaintiff in error.

Sol. Gen. FIELDER, *contra*.

By the Court.—BENNING, J., delivering the opinion.

All of the grounds of the motion but two, were abandoned. These two were the first and last.

As to the first—

Read the prosecution. The owner of the hogs alleged to have been taken, testified as follows: "That in December, 1857, he saw a black spotted hog in a pen near defendant's house; knew the hog; it belonged to witness; the marks had been changed to two splits in each ear—the splits looked like they had not been long made, and not fully healed—the hog had been altered. Witness had not seen the hog in three or four weeks—witness don't know who put the hog in the pen—did not propose to take the hog, but said he would come back, but did not—the pen was thirty or forty yards from the house of the defendant,

close to his corn crib—witness lives ten or twelve miles from defendant. The hog was in the pen with other hogs, but don't know that the marks of the others had been changed."

"Defendant then offered to prove by said Reed, what the Defendant said in explanation of the possession of the hog, when the said Reed went to the house of defendant, and found him in possession of said hog, and defendant offered in evidence what the said Reed said to the defendant," relative to said Reed's right and ownership to said hog, and what the defendant said in reply to said Reed, which the court refused to allow."

I think that the court ought to have admitted this conversation to the jury; and for two reasons; one, that the court did let in a part of the conversation—this part: "Witness did not propose to take the hog, but said he would come back." The other that, the sayings of Walker, the accused, were to be considered as the accompaniments of the act of possession, which was a continuing act, and was the leading, if not the only act of Walker in the case. Possession is a continual asportation—a continuing commission of the larceny. The sayings, therefore, were to be considered as making a part of this prolonged act. Consequently, they were admissible under the rule of the *res gestæ*.

There is a case in 8 Por. (Ala. Rep.) to the contrary of this; but if no authority is cited for this case, and the question, as to whether the sayings did not make a part of the *res gestæ*, was not, as far as appears, presented to, or considered by the court. The case is the *State vs. Wisdom*, 8 Par., 571.

It is unnecessary, if not improper, to express an opinion, on the ground that the verdict was contrary to evidence.

LUMPKIN, J., concurring.

MCDONALD, J., dissenting.

HARPER vs. PARKER.

1. When proof of a credit to which the losing party is entitled, has been rejected by the court, a new trial will be awarded, unless the judgment is abated by the amount of said credit.
2. When the point at issue between the parties, is whether a certain transaction was an absolute or conditional sale, and the court charges in both aspects of the case, and there is evidence to justify the charge, the verdict will not be disturbed.

In Equity, from Newton county. Tried before Judge CABANISS, at September Term, 1858.

This was a bill of equity for account, by David M. Parker against Edward Harper.

The bill, in substance, states that in 1848, complainant and defendant entered into articles of agreement for a partnership between them in the purchase of a mill site, the erection of a saw and grist mill thereon, and carrying on a milling business, the proceeds of which were to be equally divided between them. That in pursuance of this agreement, Harper purchased a lot of land for \$550, and took a bond for titles to himself, and complainant afterwards gave to him his note for two hundred and seventy-five dollars, his interest in said premises; defendant executed to complainant his bond for titles to one-half thereof upon the payment of said note. The bill further states that complainant afterwards paid to defendant one hundred and twenty-five dollars in part payment of said purchase money—that they proceed to the erection of the mills, and the saw mill went into operation in January, 1850, and the grist mill in April or May thereafter, and continued in operation until March, 1853, doing a successful business, and yielding large profits—that

defendant kept said mills and the books of account, and collected and appropriated the proceeds and profits thereof. That complainant transferred to W. W. Clark, Esq., an attorney at law, the bond for titles to one-half said mills, executed by defendant as aforesaid, as collateral security for the payment of a debt in his hands for collection against complainant, amounting to about six hundred dollars—that complainant paid two hundred dollars on said debt, and then, by agreement between all the parties, said bond for titles was transferred to defendant, upon his giving his note, payable in lumber for the balance due on said debt, being about four hundred dollars; and that said note was paid by lumber belonging equally to complainant and defendant, and this arrangement was made for the benefit of complainant, and for the further purpose of securing defendant as security for complainant on a note for \$850 00, held by Green B. Turner, which last note to Turner was also secured by a mortgage on other property of complainant's, and that said debt was paid off in full by complainant, and defendant discharged and released therefrom. The bill further states, that in addition to the one hundred and twenty-five dollars paid in part of said purchase,, and two negroes which he furnished about the business of the mills, he paid out large sums, amounting to one thousand dollars, in and about and for the machinery and business of the same. That defendant, after running said mills for about two years, sold and conveyed them to B. N. McNight, (from whom the premises were originally purchased,) for twenty-five hundred dollars, all of which he appropriated to his own use.

The answer of defendant admits the partnership as stated in the bill, but avers that he owned said premises at the time the partnership was formed, and sold one-half thereof to complainant and gave him bond for titles as stated, but that the amount to be paid by complainant for said half was \$257 00, and not \$275 00.

Defendant denies the charges and allegations in the bill as to the transaction with Clark, but states that said bond for titles was given up to defendant by Clark, upon defendant's paying or agreeing to pay the claim in Clark's hands, and which was done by a note given to Clark, payable in lumber. That by this operation and so understood and assented to at the time by complainant, defendant became the sole and absolute owner of the mills, and he destroyed his said bond for titles, as he had a right to do—denies that he has received any money unaccounted for and not paid out for and on account of said partnership while it lasted—denies that there was any agreement or arrangement that his bond for titles was transferred to him, as an indemnity to his being security on Turner's note; and insists that upon a full and fair settlement complainant is indebted to him several hundred dollars. Admits that he sold the place to McNight for \$2500, as his own and as he had a right to do, and denies that complainant had any right, interest or claim in and to said mills or their proceeds after January, 1852.

Upon the proof and charge of the court, the jury found for the complainant four hundred and fifty dollars. ●

Whereupon defendant moved for a new trial on the following grounds:

1. Because the court erred in rejecting three promissory notes tendered in evidence, made by complainant and payable to defendant, one of fifty dollars, due 25th Dec., 1850; and the other two for fifty-three dollars and fifty cents each; one due 25th December, 1851, the other 25th December, 1852; both dated 10th November, 1848, which were offered to show the indebtedness of complainant to defendant. •

2. Because the court erred in charging the jury, that if they believed that there was an agreement, that complainant should transfer his interest in the land and mills to defendant as collateral security, and in consideration

that defendant should pay certain debts due by complainant, and that defendant had paid those debts, then complainant was not entitled to recover any portion of the profits of said mills after said transfer, nor was he entitled to any part of the money received by defendant from the sale thereof. But if defendant had failed to pay the debts which he had assumed to pay, but had only paid a part thereof, then complainant's interest in the mills was not arrested, and he was entitled to recover his share of the profits up to the time of the sale by defendant, and one half the purchase money, and defendant was entitled to a credit for whatever sums he had paid for complainant under their agreement.

3. Because the verdict was contrary to the evidence and the weight of evidence.

The court overruled the motion for a new trial and defendant excepted.

EZZARD & COLLIER, for plaintiff in error.

FLOYD, and HARPER, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

There are but two questions in this case: 1st, did the court err in rejecting the notes offered by the defendant? 2dly, was the charge of the court correct, and authorized by the evidence?

1. We think the court was wrong in refusing to allow the notes to go in evidence. The complainant in his bill alleges that he was to pay the defendant \$275 for his half of the lot of land, upon which the mill was erected; and that he had paid \$125. The defendant in his answer states that he was to pay \$257; and that he had paid \$75. Taking either statement, and the balance due for the land was something like the amount of the three notes held

on Parker by Harper. There was enough in the proof to warrant the jury in finding that these notes grew out of the transaction, for the settlement of which the bill was filed, and we shall order a new trial in this case, unless Parker will write the amount of these notes off of the judgment.

2. We do not understand the plaintiff in error as objecting to the charge in the abstract. He contends there was no evidence to justify it. The main point in controversy between these parties, is whether, when Harper's bond was transferred to him by Clarke it was on absolute purchase of Parker's interest, or only a conditional sale, provided Harper had the debts of Turner to pay, amounting to eight hundred dollars; and upon which he was security for Parker. He did not have this debt to pay, but only paid the Roberts debt for Parker, amounting to a little more than \$400.

We think there is evidence to sustain either hypothesis; and we must say, the testimony was abundant to show that the sale was conditional, if a sale at all; and the court was warranted in charging as it did. And it is easy to demonstrate, that the finding of the jury approximated to something like accuracy, provided they adopted the theory, that the sale was not absolute.

It would be useless, therefore, to re-try this case, provided the credit of the notes is allowed. If the pleadings are faulty they could be amended. Why should these notes, if they are *bona fide* due, not be suffered to come in whether growing out of this transaction or not? This bill is for an account, and Parker owes Harper these notes. Why should they be excluded.

DOYAL AND WIFE *vs.* SMITH, EX'R.

1. Parol testimony cannot be received to add to or vary a will ; but it is admissible to explain an equivocal clause.
2. A limitation of an estate by a testator to his wife, during her natural life or widowhood, is good.

In Equity, from Henry county. Decision by Judge CABANISS, at April Term, 1858.

This was a bill in equity, filed by John A. Smith, executor of the last will and testament of Elijah S. Boynton, deceased, for the aid and direction of a court of equity in the execution of said will, and especially to have the 9th clause of said will construed and expounded.

Said clause is as follows :

"Item 9th. At my death I give and bequeath to my wife, Elizabeth Boynton, during her lifetime or widowhood, the west half of my lands, with a good house and farming tools, two cows and calves, and one year's provisions for the family, and household and kitchen furniture sufficient for the use of the family. Also Solomon's labor is to go to raise the children. When the youngest becomes of age, he shall be the property of my wife, Elizabeth Boynton, and also Floyd, a negro boy, and fifty dollars for the use of the family."

Defendants answered the bill, and upon the hearing, they proposed to prove by John A. Smith, the complainant, that at the time the will was written, he heard-testator instruct the draftsman to give the "slave, Solomon's labor, to assist in raising his youngest children, and when the youngest child came of age, the said slave Solomon, to go to his wife, Elizabeth Boynton." She then remarked to him, "who would then have him?" The testator

then replied, "that makes no difference, I will give you Floyd as your own," and instructed the draftsman accordingly, who immediately made the entry as found in the will, with which testator and wife were satisfied; and that since that time the said boy had been recognized and treated as the property of Mrs. Boynton, now Mrs. Doyal—recollects no instructions in relation to the land sufficiently distinct to state it.

The court refused to admit this evidence; holding that it went to alter, add to, or explain said will, and was inadmissible; and defendants, Doyal and wife, and the younger children excepted.

Defendants then proposed to read the answer of Elizabeth Doyal, to the bill of complainant, giving her explanation of said will. The court refused to admit said answer in evidence, as explanatory of the intention of testator. To which decision counsel for Doyal and wife, and younger children excepted.

The court then adjudged and decided that the land was devised to Mrs. Boynton during her lifetime or widowhood, and upon her marriage and termination of her widowhood, the remainder in fee being undisposed of by the will, rests in and belongs to the heirs at law of testator.

The court further adjudged the slave Solomon's labor to be appropriated to raise the younger children of the testator, and after they are raised, and the youngest attains age, then Solomon becomes the property of Mrs. Boynton, now Mrs. Doyal, and rests in her absolutely and free from any trust; and that the labor of Floyd was to be appropriated in the same way as that of Solomon, and for and during the same period, and he was then, in like manner, to become the property of Mrs. Boynton, and to rest in her absolutely.

To which judgment counsel for defendant excepted.

L. T. DOYAL, for plaintiffs in error.

JAMES S. BOYNTON, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

1. Ought the testimony of Elizabeth Boynton to have been received to show what disposition the testator intended to make of the west half of the land after the death or marriage of his widow?

The will leaves it wholly undevised; and to allow this evidence would be to add another dispositive clause to the will, which the testator himself has not seen fit to make. True, we may conjecture that he had an indistinct idea in his mind, that the minor children would use and occupy this land, not only during the lifetime of their mother, but until the youngest became of age; and yet he gives the land to his wife for this purpose during her widowhood only. As to the other clause terminating this estate, being a restraint on marriage, we think there is nothing in it. This is no condition imposed by way of penalty, but the ordinary alternative limitation of an estate upon the natural life or widowhood of the devisee. These limitations are of daily occurrence in wills; and yet nobody ever thought of construing them as penalties, held in *terrorem* over the widow to prevent her from marrying again.

Does the testimony of John A. Smith, which was offered to prove that the bequest of Floyd was intended to be a gift of the boy to the widow, stand upon the same footing as that of Mrs. Boynton?

The clause of the will, as to Floyd, may be read two ways; either as an absolute gift to the wife, to take effect immediately, or as a disposition similar to that made of Solomon. The meaning of the will as to this negro, is in the language of the books, equivocal. The testimony

is clear and conclusive; and yet, when admitted, does not add to or vary the will. For, to make it do that, you have to assume, as in the case of the land, that the will means a certain thing and nothing else. But we say that this is not true as to Floyd. After the outside proof as to him, comes in, the will is not altered, but executed as it is written; and Mr. Powell, and other law authorities, justify this course.

Judgment reversed.

JOSSEY AND WIFE vs. WHITE ET AL.

“I give to my daughter, Lucinda Mildred Brown, the following property, to-wit: Jack, &c. All the above property I give to my daughter Lucinda Mildred Brown, for her own separate support and for the support of her and her family; and the property nor its increase to be made subject to the debts of no person she may marry, it nor its proceeds, but to go wholly to her support, her and her children and family. The above property I give to my daughter Lucinda M. Brown, for her own benefit and separate support, it and its increase, for her and her children and family, and at her death it and its increase to go to her children and be equally divided between them, and the above property, it nor its increase nor its proceeds, is not to be made subject to the debts of no person that she may marry; and if she should die and leave children, and they should not be raised, and they should die, then and in that case, it is my will that all the above property that I have given my daughter be put together and the man she should marry have one-third of it and its increase, and the other two-thirds be equally divided between all my grandchildren, &c.” Held, That Lucinda Mildred Brown, (Mrs. Jossey,) took an estate for life only in the property bequeathed to her by Reuben Brown, her father.

In Equity, from Monroe county. Decision on demurrer, by Judge CABANISS, at February Term, 1859.

This was a bill in equity, filed by John H. Jossey and wife, against the remaindermen under the last will and testament of Reuben Brown, deceased, the father of Mrs. Josey, for direction and instruction as to the following clause of said will, to-wit :

“ Also I give to my daughter Lucinda Mildred Brown, the following property, to-wit : Jack, a man 28 years old, and his wife Ally, 23 years old, and her three children, Richmond, 6 years old ; Doctor, 4 years old, and Polk, 8 months old ; Miles, a man 28 years old and his wife Betty, 25 years old, and her two children, Smitha, 2 years old, and Robert, 8 months old ; and Henry, 18 years old ; Hannah, a girl five years old ; Abbey, 15 years old ; Squire, 28 years old ; July, 15 years old ; Harriett, my cook woman, 27 years old, and her three children ; Caroline, 12 years old ; John, 6 years old, and Nancy, 8 months old ; Melissa, 16 years old ; John, 6 years old ; Charles, 2 years old ; Louisa, 15 years old ; Frances, 10 years old ; Major, 14 years old ; Nat, 16 years old ; Martha, 8 years old ; Dave, a man 26 years old, and his wife, 22 years old, and her two children, Sarah, 3 years old, and William, 8 months old ; Drury, 16 years old ; my old man Jim, 65 years old ; she is not to pay anything for him, but clothe him well and feed him ; Rowany, 3 years old : 32 in all. Also I give her her piano, and she is not to pay anything for it. Also I give her one good bed and furniture and stead worth seventy-five dollars ; also, she has a bed and furniture of her own that her cousin gave her, and what quilts she shall make while living with me, she is not to be charged with them. Also I give her six first choice mules and six pair of plough gear and six ploughs and stocks, my best wagon and a full set of wagon gear, stretchers and fifth chain ; forty head of hogs of equal sexes ; six cows and calves and all my sheep. Also, I give to my daughter, Lucinda M. Brown, the following

lots of land: My plantation that I now live on with all its improvements; gin and running gear and gin-house, and wheat-thrasher and wheat-fan, and a lot of land called the Franklin land, joining John B. Ogiltree's land and McDavis' land; also lot of land known as No. 8, joining John B. Ogiltree and Joseph Hill's land, all in the sixth district of Monroe county, six hundred and seven acres, more or less.

"All the above property I give to my daughter Lucinda Mildred Brown, for her own separate support and the support of her and her family, and the property nor its increase is to be made subject to the debts of no person she may marry, it nor the proceeds, but to go wholly to her support, her and her children and family; the above property I give to my daughter Lucinda M. Brown, for her own benefit and separate support, it and its increase, for her and her children and family, and at her death, it and its increase, to go to her children, and be equally divided between them, and the above property, it nor its increase nor proceeds is not to be made subject to the debts of no person which she may marry; and if she should die, and leave children, and they should not be raised, and they should die, then, in that case, it is my will that all the property that I have given to my said daughter be put together, and the man she should marry have one-third of it and its increase, and the other two-thirds be equally divided between all my grand-children, and the property and money that my daughter shall receive of my estate is to go in the way that I have left the above, and having the utmost confidence in my three worthy friends, Z. E. Harman, and John H. Thomas, and Nathan Phillips, I do constitute them as my lawful trustees to the property that I have bequeathed to my daughter Lucinda M. Brown, and to her children, and to see her and her property justice done, and at all times she is to have a plenty of pocket money, enough to travel on,

and she is to be dressed well out of the proceeds of the property I have left her, and my trustees is to be the judge of her pocket money and dressing, and her property is not to be carried out of the reach of my trustees except they are made safe, that the above property shall go to her and her children, and if my trustees is put to any trouble in seeing to said property, or expense, I give them full power to hire out said property and pay themselves for the trouble they have been at, and what money they have paid away in seeing her and her property justice done; and if any of the servants should act in such a way as my trustees think it is best to sell them, and my daughter's interest, I give them full power to sell, and take the money arising from the same and buy one and put it in the place of the one sold; and at my departure I wish for my trustees to take charge of the property that I have bequeathed to my daughter Lucinda M. Brown, and manage it in the best way that they in their judgment may think will be to her interest and welfare, and her children."

The bill was dated 9 January, 1850, and testator died during the same year. John H. Jossey, the complainant, intermarried with Lucinda M. Brown, 12 February, 1850, and they have had no children, and the bill alleges that there is no probability that Mrs. Jossey will ever have any child or children, and counsel for complainants submit, first, that under said will an estate tail is created in Lucinda M. Brown, now Mrs. Jossey, and under the act of 1821, the same became an estate in fee and rests absolutely in her; or, second, that the limitations over are too remote and void. Third, that the contingency upon which the limitation over is to happen, viz: The death of Mrs. Jossey, leaving children who die before they are raised, can never happen if Mrs. Jossey never has a child, and therefore said limitation can never take effect.

Defendants demurred to this bill on the following grounds:

1. That the property and its increase, given to Lucinda M. Jossey, is not devised and bequeathed to her absolutely and in fee simple, nor is it subject to her power and disposition, but is vested in her trustees, for the purposes specified in the bequests to her.

2. That the estate of said Lucinda M. in said property is a qualified and limited estate for her separate use and benefit, and the use and benefit of her children and family during her life.

3. That after the said qualified and limited estate for life, shall terminate by her death, said property and its increase is given by said will to the children of said Lucinda M. on condition, that her child or children shall be raised or come to years of maturity.

4. That in the event said Lucinda M. shall die, leaving no child, or if she should die leaving a child or children, who should not be raised to years of maturity, then, upon the happening of either of said contingencies, after the death of said Lucinda, the fee simple in and to said property rests, one-third in her husband surviving her, and two-thirds in the grand-children of the testator.

The court sustained the demurrer and dismissed the bill, and complainants excepted.

PEEPLS & CABANISS, and STEPHENS, and HALL, for plaintiffs in error.

TRIPPE, and GIBSON, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

A very short time need elapse to bring about a very great change in the destination of the property disposed of by the will of Reuben Brown. For not only is there a possibility of issue by the present husband of his daughter, Lucinda M.; but should Jossey die and the widow

intermarry, the possibility would be increased almost to a probability, that she might have offspring by another husband. I refer to the well authenticated physiological fact that a *feme covert*, who remained for years barren, during her first marriage, was delivered of twins in nine months from the date of her second. This has occurred twice in this State within my own knowledge; and should the child or children by the present or any future husband be "*raised*," all the questions but one which are involved in this record, would be settled without the judgment of this or of any other court.

The only exception we propose to consider and decide in this case is, what estate did Mrs. Jossey take under the will of her father? And we answer confidently, a life estate only, and nothing more. The rule in Wild's case is not applicable to this. The first resolution in that case was, that when lands are devised to a person and his children, and he has no children at the time of the devise, the parent takes an estate tail. And the reason assigned for this doctrine is, that children or immediate devisees, cannot take, because they are not *in esse*; and by way of remainder, they cannot take, for that was not the devisor's intent, for the gift to the children was immediate. Therefore, such words shall be taken as words of limitation.

With the reason of this or any other technical lore connected with this branch of the law, I have nothing to do. Thank God, it no longer cumpers our statute book. Under our late act, it will soon be buried, with the numerous other follies and fossil remains of a by-gone age.

But the second resolution in Wild's case does cover and control this. It is, that if a man devise lands to husband and wife, and after their decease to the children, in this case, although they have not any child at the time, yet any child which they have after, may take by way of remainder. For his intent appears that the children should not take immediately, but after the decease of the parents.

Taking the two resolutions then together, they amount to this: A devise to one and his children when he has no children, conveys an estate tail. But a devise for life with remainder to children, is good, and will rest in such child or children as may be born afterwards.

All the interest the children of Lucinda M. take in the life time of their mother, is a support out of the property of her separate estate. There is no immediate gift to them of the property. At the death of their mother it goes to them absolutely, subject to be divested if they should die without having attained to *maturity*. The fee then does not rest in Mrs. Jossey, under the rule in Wild's case, by virtue of the act of 1821.

But it is insisted that the limitations over, creates a perpetuity, and is therefore, void.

That will depend upon the answer to the question—must the contingency upon which this estate is limited to the child or children of the daughter, happen, if it happen at all, within the compass of a life or lives in being at the death of Reuben Brown, the testator; and twenty-one years and the fraction of a year afterwards? If so, the limitation over is good, by way of executory devise.

The contingency upon which this estate must take effect, is Lucinda M. Brown, (Mrs. Jossey,) leaving children at her death who may die and not be *raised*. This event must necessarily happen, if it happen at all, within the time above specified. Whether she should leave child or children who should be raised or die and not be raised, the fact will be ascertained beyond all doubt within twenty-one years and nine months after the death of the mother. The property must vest absolutely before that time, and become alienable and descendible; or it will be fixed and settled, that if the child or children if any are dead before being raised, or coming to maturity, and the estate will go over.

Cloud & Shakelford vs. Hartridge and Hartridge, Admr's.

This bequest, therefore, is not subject to the rule against perpetuities; and the life estate of Lucinda M. is not enlarged to a fee, under this aspect of the will.

The heirs at law not being parties to the bill, we decline expressing any opinion as between them and the husband and grand-children. We are fully prepared to do so, under the able and lucid argument which has been submitted in this case. The thorough investigation of the doctrines involved in this discussion, is highly creditable to the counsel, and of incalculable benefit to the court, in enabling it to come to clear and satisfactory conclusions.

CLOUD & SHACKELFORD vs. HARTRIDGE AND
HARTRIDGE, ADM'RS.

1. When cotton is weighed by ware-house men, and an account of the weights is rendered the storer, their books and not his, are the best evidence as to the weights.
2. Notwithstanding temporary administrators, or such as have no authority to sell cotton, and appropriate the proceeds to the acceptances of their intestate on drafts drawn by the owner of the cotton; still, if they notify the owner that they shall do so, and he acquiesce in the arrangement, he will be bound by it; and if sued for the cotton, they could plead and prove that the proceeds had been properly applied.

Assumpsit for cotton reclamations, in Spaulding superior court. Tried before Judge CABANISS, at May Term, 1858.

Charles Hartridge, of Savannah, in his lifetime, accepted two drafts for plaintiffs in error, one amounting to

\$13,074 04; and the other to \$13,074 03, both at thirty days. These acceptances were made on the faith and credit of 605 bales of cotton, consigned to him by plaintiffs in error. Hartridge died before the maturity of the drafts; temporary letters of administration on his estate were granted to defendants in error, who informed the drawers, Cloud & Shackelford, by letter, that the drafts must be paid at maturity, and if funds were not otherwise furnished, they should sell the cotton. To this letter, Cloud & Shackelford made no reply. The cotton was sold and the nett proceeds amounted to \$24,455 95, and account of sales transmitted to the defendants. The plaintiffs paid the drafts in full at maturity, amounting to

\$26,199 59

Cr. by nett proceeds of 605 bales cotton, 24,455 95

Due estate of Charles Hartridge, \$1,723 64
And to recover this amount, the defendants in error brought this action.

The defendants in the court below pleaded that the plaintiffs had no authority to sell said cotton in payment of said drafts—that Hartridge, their intestate, died before their maturity, and plaintiffs were under no legal obligation to pay the same until the expiration of twelve months from the grant of administration. They further pleaded, that the account of weights of said cotton as rendered by the plaintiffs was not correct—that said cotton weighed some six thousand pounds more than appeared by the account rendered by them.

At the trial, after plaintiffs had closed, defendants went into their defence, and amongst other testimony offered in evidence, their books, containing the entry and account of the number and *weight* of the bales of cotton consigned by them to the intestate. The court rejected the evidence, holding that said entries were inadmissible, and defendants excepted.

The court charged the jury amongst other things, that it was incumbent on the plaintiffs to prove their account sued on—that the acceptance of the drafts by their intestate created a liability, and that his administrators were not subject to suit thereon until twelve months after grant of letters; but they were not bound to wait that time before paying the drafts, but might pay them sooner if they were in funds, &c.

That as temporary administrators, plaintiffs had no right to sell the cotton; but if they notified defendants that they would sell the cotton to meet the drafts at their maturity, and defendants made no objection, and they afterwards sold the cotton and rendered an account of sales, and defendants assented to and acquiesced in said sale, and used the account of sales rendered in evidence, then they were bound by said account thus rendered and accepted, and were estopped from denying its correctness.

The jury found for the plaintiffs fifteen hundred and thirty-five dollars and fifty-nine cents (\$1535 59.) Whereupon defendants moved for a new trial on the following grounds:

1. Because the court erred in excluding defendants books of account offered in evidence.
2. Because the verdict is contrary to law, the evidence, and charge of the court.
3. That the charge of the court as above stated was erroneous.
4. That the court erred in charging the jury upon an assumed state of facts.

The court refused the motion for a new trial and defendants excepted.

GREEN & MARTIN, for plaintiffs in error.

ALEORD & MOORE, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

1. The court was manifestly right in refusing to permit the defendants to prove by their books the weight of the cotton forwarded to Hartridge. The entries were made from an account of the weights furnished by the warehouse men, who weighed the cotton. Their books, if they kept books, as doubtless they did, and if not, their testimony, were better than the books of the defendants. At any rate, defendants failed to make it appear that the higher evidence did not exist; and the presumption is that it did.

2. Hartridge having died after the cotton was received, his temporary administrators notified the defendants that they should be compelled to sell the cotton to meet the drafts drawn upon it. No objection was made. They did sell it, and transmitted to the defendants an account of sales. No complaint was made. When suit was brought to recover the over-advance after giving the defendants credit for the cotton, the defendants gave this very account of sales in evidence. They offer no proof to impeach the *bona fides* of the sale. On the contrary, the plaintiffs prove that the cotton was well sold.

The judge charged the jury that the plaintiffs had a right to infer from the silence of the defendants, that they acquiesced in the proposed sale; and that the account, upon the facts in this case, was conclusive against the defendants. All of which is excepted to.

It is rather difficult to comprehend the position of the defendants. They offered the account of sales rendered by the plaintiffs. And if they had not, what would have been the result? Instead of a recovery for the excess only, the plaintiffs would have obtained judgment for the full amount of the drafts; leaving the defendants to look after their cotton in Savannah. The last thing, perhaps, they would desire to do.

Well, suppose it be conceded that the temporary administrators had no right to sell the cotton, and they certainly

could derive no authority to do so from their office; still, if sued, they could plead and prove that the proceeds of the cotton was properly applied; and no recovery could be had against them. Of what avail, then, is the complaint that they had no right to sell defendants' cotton? There was the strongest moral obligation to appropriate this cotton to the payment of these drafts; and we confess we are unable to appreciate the merits of this defence.

If, as it is stated outside of the record, there was unreasonable loss in the re-weighing of this cotton, that would depend upon the accuracy of the ware-house men at Griffin, and Mr. Sullivan at Savannah; and this was a legitimate subject of enquiry. I need not remark on the loss in the weight of cotton, especially that which is picked and packed early in the season. Between this country and Liverpool it is said to amount sometimes to 60 or 70 lbs. on the bag, notwithstanding the transportation is by water. When forwarded by land the difference is greater.

Upon the whole, we see no reason for disturbing this judgment.

Judgment affirmed.

HAMILTON vs. CONYERS.

1. A plea, which, in effect, is a plea, of partial failure of consideration, that in ascertaining the price of lands sold, which was to be arrived at by estimating the number of acres in all the lands, there was a fraud or mistake in setting down the number of lots of land by which one lot was added improperly, is a good plea.
2. A plea, filed as a plea of *non est factum*, and of no value except as such plea, need not be stricken out, if the affidavit of its truth be expunged. It cannot benefit the defendant nor harm the plaintiff.

3. Evidence of fraud or mistake, in making the estimate of the price to be paid for a settlement of land, in a suit on a note given for the land is admissible, although notes and a bond for titles expressive of the contract were signed by the parties, and such evidence does not vary or contradict the written testimony.
4. A party cannot support the testimony of his own witness before he is attacked either for want of character or because he has made contradictory statements.
5. If, on a note given in part of the consideration agreed to be paid for lands, the payee enter that the principal of the note is reduced one thousand dollars in consequence of the correction of an error in the bond for titles, such entry does not *bind* the party making it; it depends on whether the error was in the contract, and in the process used in arriving at the aggregate price of all the lands, to give effect to which the bond for titles was given.

Complaint and motion for New Trial, in Cass Superior Court, before Judge TRIPPE, at September Term, 1858.

This was an action by Thomas Hamilton against Bennett H. Conyers, to recover one thousand dollars and interest thereon, the balance due on a promissory note, given by Conyers to Hamilton.

The defendant pleaded the general issue and payment; and also a further special plea that said note was given for a settlement of land, composed of lots and parts of lots represented by plaintiff, as making and being 26 forty acre lots; that said land was sold at \$25 per acre, making one thousand dollars per lot, when in fact there was but twenty-five lots; lot No. 738 being written and counted twice by plaintiff, and that there were consequently no consideration for the balance of \$1,000, apparently due on the face of said note. The plea further states that defendant called on plaintiff after said error was discovered, when plaintiff entered on the back of said note the following: "February 13th, 1852. The principal of this note is reduced by the sum of one thousand dollars, in consequence of a correction of an error in the bond for titles, in which 738, as the number of a lot, was inadver-

tently twice noted down ;” and that afterwards, without defendant’s knowledge, and in his absence, plaintiff altered said entry, by adding thereto the following, viz: “but is to continue so reduced only till disinterested men shall have decided that such a reduction should be made for such an error,” and that the bond for titles was altered in accordance with the entry as first made on the note.

The evidence being closed, the presiding Judge charged the Jury as follows :

This is an action on a promissory note ; the plaintiff insists that there is still due on this note one thousand dollars, besides interest. The defendant pleads payment, and insists that it is proven, that it is all paid. On the note, offered in evidence, there is a memorandum that the principal of the note is reduced by the sum of one thousand dollars, &c. If this memorandum stands as a credit on this note, then it is to be admitted that the plea of payment is sustained, and you should find for the plaintiff the costs only till the appeal was entered. If it does not stand as a credit, then you should find for the plaintiff one thousand dollars with interest from the date of the note. It is an acknowledgment, an admission, on the part of the plaintiff, that it is reduced \$1,000, if disinterested men shall determine that said note ought to be so reduced ; in other words, it is proof that this note is reduced, if, under the circumstances of the case, it ought to be so reduced. This note was plaintiff’s paper, his property, and plaintiff had the right to put what memorandum he pleased on it. But if plaintiff put anything there which amounts to an acknowledgment, an admission, that any part of said note is not due, whenever he offers it in evidence it will bind the plaintiff.

The plaintiff admits that it is so reduced if disinterested men shall say that it ought to be. This matter never having been by both the parties heretofore, is now submitted to you. There was no obligation on the part of

the defendant to submit this matter to any one but you. The memorandum on the back of the note, offered in evidence by the plaintiff, admits that there was an error, &c., and admits the amount of principal of note reduced on account of said error \$1,000, if for such an error that reduction ought to be made. The parol evidence in this case has been admitted not to vary the contract as evidenced by the bond and note, but to explain the admissions of plaintiff contained in the memorandum on the note, what plaintiff did admit, or intend to admit. This admission is no contract, and requires no consideration to support it, other than the error, if error there was, to make it obligatory on the plaintiff. If it is obligatory on plaintiff, under the instructions of the Court on this matter, it then amounts to a receipt, or has the effect of a receipt on the note. If plaintiff, at the time he made the entry on said note, admitting the error, was mistaken, and no error, which ought to effect the note, existed, then plaintiff is not bound to allow the receipt, and it is no payment or reduction of the note. Then the question for your determination is, ought the reduction to have been made? If, from the testimony in this case, you believe that the plaintiff sold and defendant bought plaintiff's settlement of land in gross, and not as containing so many lots of land, for the price specified, and that defendant got the land he bargained for, then the defendant is not entitled to the credit insisted on, although the settlement of land did not contain the number of lots supposed by the parties.

Again, if the Jury believe, from the testimony, that the error admitted by the plaintiff in the memorandum on the back of the note consisted in noting down the number of one of the lots twice, when 364 was one of the lots sold, and made one of the 26 lots sold, then the defendant is not entitled to the credit of \$1,000, although he may have bargained for the twenty-six lots, and not for

the settlement of land in gross. If the Jury, however, believe that plaintiff intended to sell defendant, and defendant intended to buy 26 lots of land at \$1,000 each, and that only 25 lots were actually sold to defendant, and that is the error admitted in the memorandum, for which the reduction was to be made, then, and in that case, the defendant is entitled to the reduction of \$1,000, and you should find for the plaintiff only the costs up to the entering the appeal.

The Jury found for the defendant; whereupon counsel for plaintiff moved for a new trial, on the following grounds, viz :

1st. Because the Court erred in refusing to strike out the second plea, on motion made by demurrer thereto by plaintiff's counsel.

2d. Because the Court erred in refusing to strike the plea, on motion of plaintiff's counsel, of "*non est factum*," which set forth that an addition had been made to an entry on the note, without the knowledge of the defendant, the Court deciding that it was not a plea of "*non est factum*," and ordered the affidavit only to be stricken.

3d. Because the Court erred in admitting in evidence parol evidence going to show that the plaintiff sold the defendant one thousand and forty acres of land at twenty-five dollars per acre, the contract being one which the law required to be in writing, and which was in writing, as was shown by the note and the bond which were in evidence; the said parol evidence being objected to by plaintiff's counsel.

4th. Because the Court erred in admitting parol evidence going to show that the plaintiff sold to the defendant twenty-six lots of land, at one thousand dollars a lot; plaintiff's counsel objecting to the same on the ground that it was illegal, and went to add to, contradict, or vary the written contract.

5th. Because the Court erred in admitting each part

and parcel of the parcel evidence offered by the defendant going to show that the land was sold by the lot; the same being objected to by plaintiff's counsel. •

6th. Because the Court erred in rejecting the evidence of Turner H. Trippe, the presiding Judge; that Edmund S. Harris, a witness whose testimony had been introduced by the plaintiff, was a man of strict integrity and scrupulous regard for the truth; which testimony the plaintiff proposed to introduce.

7th. Because the Court erred in charging the Jury that the entry on the note is an acknowledgment and admission on the part of the plaintiff that the note is reduced one thousand dollars, if disinterested men should say that said note ought to be thus reduced; in other words, it is proof that the note is reduced, if, under the circumstances, it ought to be so reduced.

8th. That the Court erred in charging the Jury, "This note was plaintiff's paper, his property, and plaintiff had a right to put what memorandum he pleased on it, or to add to that memorandum what he pleased; but if he, plaintiff, put anything which amounts to an acknowledgment, an admission, that any part of said note is not due, whenever he offered it in evidence it will bind the plaintiff;" and the Court erred in charging the Jury "That the plaintiff admits that it was so reduced, if disinterested men should say that it ought to be. This matter never having been by both parties submitted to disinterested men, therefore it is now submitted to you.

9th. Because the Court erred in charging the Jury that the memorandum on the back of the note, offered in evidence by the plaintiff, admits that there was an error, &c., as stated in the entry, and admits the amount of the principal of the note is reduced on account of said error \$1,000, if for such an error that reduction ought to be made.

10th. Because the Court erred in charging the Jury—

"This admission is no contract, and requires no consideration to support it other than the error, if error there was, to make it obligatory on the plaintiff. On this matter it then amounts to a receipt, or has the effect of a receipt on the note."

11th. Because the Jury found contrary to the law and the charge of the Court.

12th. Because the Jury found contrary to law.

13th. Because the Jury found contrary to the evidence.

14th. Because the verdict of the Jury is manifestly, and strongly, and directly against the weight of evidence.

It was admitted on the trial that the defendant had paid all the cost that had accrued before the appeal, and all the principal and interest except \$1,000, and the interest on that sum.

The Court overruled the motion for a new trial, and counsel for plaintiff excepted.

J. W. H. UNDERWOOD, WRIGHT & SHROPSHIRE for plaintiff in error.

W. AKIN, CHISOLM & WADDELL, and MILNER, *contra*.

By the Court.—McDONALD, J., delivering the opinion.

This was an action of complaint in the Court below, for the recovery of a balance of one thousand dollars, claimed to be due on a promissory note of thirteen thousand dollars. The defendant appeared and pleaded the general issue and payment. He also pleaded that the said promissory note was given in part payment for a settlement of land, composed of lots and parts of lots sufficient to make (or were so represented by the plaintiff to the defendant) twenty-six forty acre lots of land; that the plaintiff rated and sold the land to the defendant at twenty-five dollars per acre, making one thousand dollars per lot, when in truth and in fact the plaintiff did not own

but twenty-five forty acre lots; and in making out the number of said lots, said plaintiff set down lot No. 738 twice, and said plaintiff wrote it twice in said bond, thereby selling and conveying to the defendant forty acres of land more than the plaintiff owned. The plea further alleges that the defendant was ignorant of the error until after the note was given and the bond executed, and that when he discovered the said error he called on the plaintiff to correct it, which he promised to do, and on the 13th day of February, 1852, in order to correct said error, the plaintiff made the following entry on the back of said note: "February 13th, 1852.—The principal of this note is reduced by the sum of one thousand dollars, in consequence of a correction of an error in the bond for titles, in which seven hundred and thirty-eight, as the number of a lot, was inadvertently twice noted down;" and that afterwards, at some time in the absence of the defendant, and without his knowledge or consent, the said plaintiff wrongfully and fraudulently altered said entry on said note, which had been entered there by an agreement between the said plaintiff and the defendant, by adding thereto the following, to-wit: "But is to continue so reduced only till disinterested men shall have decided that such a reduction should be made for such an error;" and that the bond was altered by the plaintiff in accordance with the entry on the note, by agreement between the said plaintiff and defendant, and at the time of the first entry so made, and before it was altered as aforesaid. The defendant therefore claimed a credit of a thousand dollars, for and on account of the error of said plaintiff, in selling to the defendant one lot of land more than he owned at the time. The defendant filed a plea of *non est factum* to the entry made by the plaintiff on the back of the note, that such entry was not the act or deed of the defendant. On objection to this plea by plaintiff's counsel as a plea of *non est factum* the Court below directed the

affidavit of defendant, of the truth of it, to be stricken out, which left the matter pleaded harmless to the plaintiff. The parties went to trial on these pleadings, and the parties respectively introduced their evidence. The presiding Judge also charged the Jury as above set forth.

The Jury returned a verdict for the defendant, whereupon the plaintiff moved for a new trial, on the several grounds set forth in the motion.

1. The first ground in said motion is the refusal of the Court to sustain the demurer to the second plea of the defendant. The plea demurred to is, in effect, a plea of partial failure of consideration, and alleges that the price agreed to be paid was fixed by ascertaining the number of acres of land sold, and its value at \$25 per acre, and that, in making out the number of lots, the plaintiff set down one lot twice, and that the plaintiff wrote it twice in the bond. According to the plea the sale was not of a part or of parcels of land for a gross sum, but for a sum to be ascertained, and which was ascertained by first arriving at the number of acres, and then its value at \$25, for each acre. It is alleged that there was a deficiency of forty acres in the quantity, and to that extent it is claimed that the defendant is entitled to a credit on the note. We do not think, therefore, that the plea was demurrable.

2. We think that the Court did, in effect, strike out the plea of *non est factum*, when it directed the affidavit to be stricken. The object of the plea was to deny what was never insisted upon, that the credit on the back of the note was not the act or deed of the defendant. After striking the affidavit, nothing remained that was not in the plea which preceded it. It was emasculated of the energy which the defendant had given it by annexing his affidavit to it.

3. The parol evidence objected to by plaintiff's counsel, and admitted by the Court, the admission of which is

made the third ground in the motion for a new trial, was not offered to prove a contract by parol, which the law requires to be in writing, and which can be evidenced by writing only. It does not fall within the rule of law on which the objection is based. The contract is in writing, and remains in writing, but because the law requires it to be in writing, it does not place it beyond explanation or impeachment. The parol evidence does not show that the contract was not as specified in the note and bond, viz: that the defendant agreed to give the plaintiff twenty-six thousand dollars for a settlement of land. That is the admitted contract, but it is proposed to show, by parol evidence, that in arriving at the price for the settlement, a particular process was resorted to by the parties, to-wit: to ascertain the number of lots of forty acres of land each the quantity of land in the settlement would make, and by valuing them at one thousand dollars per lot get the agreed price of the entire settlement, and that, in computing the price in that manner, there was an over-estimate of the number of lots of land sold. Such evidence, we say, on the fourth ground in the motion for a new trial, does not vary, add to or contradict the written contract. For reasons already assigned, we do not think that a new trial should have been ordered on the fifth ground taken in the motion. Some of the Court are of opinion that parol evidence was admissible to explain an ambiguity in the bond, For myself, I place my judgment on other assigned reasons.

4. It does not appear that the defendant introduced evidence to impeach the testimony of Edmund C. Harris, a witness for plaintiff, either by proof of bad character or of contradictory statements. It is unnecessary to determine the question whether the presiding Judge might have been *sworn* as a witness in the cause, as that point will not be involved in this case again.

5. The seventh, eighth and ninth grounds in the mo-

tion for a new trial, all relating to the charge of the Court, may be disposed of together. They all relate to the entry or memorandum made on the back of the note, and, more or less, to its effect as evidence against the plaintiff. In considering the charge in this relation, we must regard the pleadings and the evidence in connection with the entry. There are two averments in the plea:— 1st, That in making out the number of lots of land, the plaintiff set down lot number seven hundred and thirty-eight twice; and 2d, and that said plaintiff wrote it twice in the bond. The counsel for defendant, with his usual skill and vigilance, looked no doubt well to the nature of his defence before he filed his answer, and concluded that, if there was a mistake in the bond only, and none in the schedule of lots made in ascertaining the price of the whole land sold, the thousand dollars claimed by the plaintiff were still due. Hence he made that issue lest the other should fail. The note and bond were given in evidence to the Jury. The price had no doubt been ascertained, and the contract made by the parties before the notes and bond were written. The bond recites that the notes had been given, states the amount of each and when payable. Dr. Young testified that the defendant told him that he had bought twenty-six lots from the plaintiff, at one thousand dollars a lot, and that plaintiff had but twenty-five lots in the settlement; that when he bought the land all the lots and parts of lots were put down, and the number of acres in each lot, and that the acres were added up and multiplied by twenty-five, in order to ascertain the price for the land, and it made \$26,000. This statement corresponds with the manifest inference from the terms of the bond, that every particular of the contract had been arranged and agreed upon between the parties before they set down to reduce it to writing. If this be so, the rights and obligations of the parties depend on the accuracy of the schedule of lands

made at the time spoken of by the defendant. Whether it agreed with the bond or not, it should be taken as the contract of the parties on the trial of the issue between them. If the error was in transcribing the numbers from the schedule, and not in the schedule, the defence set up is inadmissible. If it was in the schedule made out before hand, and there were not, in fact, as many lots of land, or acres, as the aggregate price was made up upon, then the defence is made out. The entry on the back of the note was for the correction of an error in the bond for titles, in which seven hundred and thirty-eight, as the number of a lot, was inadvertently twice noted down. It is so stated. Allowing the entry to stop here, and rejecting entirely the part which was unquestionably added without the knowledge or consent of the defendant, and it by no means follows conclusively that there was, in fact, an error committed by the parties in the process of arriving at the value of the lands embraced by the actual contract. According to the evidence of the attesting witness of the bond, he was called on to notice that one lot of land, whose number was not remembered, was not put in the bond. If such was the fact, the price was right as put in the notes, for, striking from the calculation the second entry in the bond of lot number 738, and the complement of land upon which the price of the entire settlement of land was reckoned, was equal to twenty-six forty acre lots. All these contested matters are for the determination of the Jury, upon the evidence submitted to them by the parties. It will be readily perceived, from what we have said, that in our judgment the presiding Judge erred when he instructed the Jury that, "if the plaintiff put anything which amounts to an acknowledgment, an admission, that any part of said note, whenever he offers it in evidence, it will bind the plaintiff." A word or words are wanted in this sentence of the charge of the Court, to make it complete, but as it is, it is un-

derstood, and must be understood as applying to the indorsement on the note that the principal is reduced one thousand dollars, &c. Taking the charge in this relation and the Jury must have understood the law of the case to be that the plaintiff was *bound* by it; that it was not necessary to enquire further. The charge was too strong and absolute, for, although the admission was unquestionable, that the principal of the note was reduced one thousand dollars, in consequence of a correction of an error in the bond for titles, the plaintiff was not *bound* by it, if the error was in the bond for titles only, and not in the agreement itself, of which the bond was intended to be the evidence. The fault of the charge is that the presiding Judge told the Jury that the admission would *bind* the plaintiff. The entry was evidence, for what it was worth, on the issue, that in making out the number of said lots the plaintiff set down lot number 738 twice. It is a misfortune that the original paper on which the numbers of the land were put down, with the quantity in acres in each lot, and added together to make the aggregate, and that aggregate multiplied by twenty-five, was not preserved to be produced on the trial. That would be conclusive on all the issues between the parties.

The Court further charged the Jury that "the plaintiff admits it was so reduced, if disinterested men should say that it ought to be, this matter never having been submitted to disinterested men heretofore, is now submitted to you." This latter part of the charge omits an essential part of the admission, viz:—"for *such* an error;" of course because a number was twice noted down on the *bond*. Our judgment is, that the plaintiff was not *bound* by the admission referred to by the Court in his charge to the Jury, but it was open to argument and explanation, like any other admission of a party, and the Jury ought to have been so instructed.

The charge referred to in the tenth ground of the mo-

tion for a new trial required some qualification. To make the admission obligatory on the plaintiff, it must have been an admission of an error in the contract as hereinbefore remarked upon. There, we think, is the whole issue, whether ~~there was an error~~ in the estimate of lots first made. The endorsement on the note does not admit that. To that point alone we think the attention of the Jury should be directed upon a full consideration of all the evidence in the case.

As the cause goes before another jury for trial, we think it would be improper for us to express any opinion on the other points taken in the motion for a new trial.

Judgment reversed.

WHITLOCK vs. CREW.

1. If the declaration is amendable, so as to make it fit the evidence, the evidence should be received.
 2. An award made under a rule of Court, according to the act of 1799, takes the place of the verdict, and the judgment on it the place of the judgment on the verdict. Consequently the judgment is admissible in evidence, as to persons not parties to it, in the same way in which it would have been so admissible had it been a judgment on a verdict.
 3. A party's answers to interrogatories are evidence against him as admissions, though the interrogatories may belong to a different case.
 4. The drawer of a lot of land conveyed it with warranty, and the purchaser took possession. The drawer failed to take out his grant, and the lot was granted to another person, under the forfeiting act, and he evicted the purchaser from the drawer, and that purchaser sued the drawer on his warranty.
- Held*, That he was not entitled to recover interest on the purchase money, for the period between his purchase and the issuing of the grant, as he had enjoyed the rents of the land during that period.

COVENANT, in DeKalb Superior Court.

Tried before Judge BULL, at October Term, 1858.

This was an action of covenant by William Crew against Charles W. Whitlock, to recover damages for the breach of warranty of title, contained in a deed executed by Whitlock, conveying a certain lot of land situated in the county of Muscogee.

The bill of exceptions and record in this case having failed to reach the reporter, and no copies thereof having been furnished to him, he is prevented from making the usual statement of facts. But the points adjudicated and determined will, it is believed, be sufficiently understood from the following opinion of the Court, pronounced by Judge Benning:

GARTRELL & HILL and L. J. GLENN, for plaintiff in error.

MURPHY & CANDLER *contra*.

By the Court.—BENNING, J., delivering the opinion.

Was the Court below right in admitting the deed to the Jury? We think so. (1.) The deed, it seems, did not contain the word "assigns"—to him and "his assigns." And the declaration set it out as containing that word. The word "assigns" was subject to be struck out of the declaration by amendment at any time.

Was the Court right in admitting to the Jury the first set of the interrogatories of Peacock? The objection to their admission was, that in them it was stated that the notice of the pendency of the ejectment was given to Whitlock, the warrantor, in 1848, which was before the commencement of the ejectment. But the second set of Peacock's interrogatories says that the notice was given in 1849, after the commencement of that suit, and the

statement in the first set was probably a mere mistake of the year. At any rate, even if it was true that the notice was given in 1848, the proof of such a notice could not have hurt Whitlock.

The bill of exceptions contains this statement: "The plaintiff then offered in evidence an exemplification from the Superior Court of Muscogee, from which it appeared that Jacob Lamb commenced his action of covenant against Wm. Crew, returnable to the August term, 1852, on a warranty deed to said lot of land, No. 176, in the 8th district of Muscogee county. That at the May term, 1856, said cause was, by consent of said Lamb and Crew, and by order of the Court, referred to the arbitrament and award of Anderson C. Hudson, John Holmes, Wilson Gordy and Isaac H. Webb, who, at the same term of said Court, awarded to the said Lamb \$2,100, which award was made the judgment of said Court,"

"To which exemplification counsel for defendant objected. The Court overruled the objection, and counsel for defendant excepted."

Was this decision right? We think it was.

(2.) The ground of objection, as stated to us, was, that Whitlock was not a party to the arbitration. True; but the arbitration was under an order of Court, according to the Judiciary act of 1779; and therefore the award was the same as a verdict, and the judgment on the award the same as a judgment on a verdict; and a judgment on a verdict is evidence of its own existence, even as to persons not parties to it. And the object, here, was merely to show that Lamb had a judgment against Crew, on Crew's warranty to Lamb, Crew not having the right to resort to Whitlock's warranty to him until he had made good his own warranty to Lamb; and the judgment showing at least this much, that Crew's liability to make his warranty good to Lamb was fixed.

Was the Court right in allowing Crew to read Whit-

lock's interrogatories to the Jury? Those interrogatories were taken in another case; and that was the ground of the objection to their being read. But they were read, not as interrogatories, but as admissions made by Whitlock. And, in that view, it is clear that they were admissible.

The Court allowed Crew to read to the Jury a *fi. fa* in favor of Littleton Morgan, administrator of Jacob Lamb, against Crew for \$2100, with an entry thereon, "Satisfied in full." And that was excepted to.

A ground of objection was, that the *fi. fa* and the judgment (that in the exemplification aforesaid) were not between the same parties, the latter being between *Lamb* and Crew, the former between *Lamb's administrator* and Crew. But we think that there is enough to show that the *fi. fa* belonged to that judgment, and that the administrator of Lamb became plaintiff in it, after Lamb's death, merely as the representative of Lamb.

Another ground of objection was, that the *fi. fa* did not prove itself, but that an exemplification of the judgment was necessary to prove it. We do not think so. By our law execution is directed to all the Sheriffs of the State. But even if it were so here there was such an exemplification—the exemplification of the case between *Lamb* and Crew—that the *fi. fa* belonged to that case there can hardly be a doubt.

One of the charges of the Court to the Jury was "that, to entitle the plaintiff to recover, no notice of the action of ejectment in favor of Harris against Lamb was necessary to Whitlock, unless it was to enable the plaintiff to recover attorney's fees and cost, and as they were not claimed in the case notice was immaterial." Whether this charge was right or not depended on what the evidence was as to paramount title and eviction, and what that was the record does not give us. It is of no consequence, however, for there is a plenty of evidence to show

that Whitlock did, in fact, have notice of the ejectment. No motion for a new trial was made.

Another charge was, "that if the plaintiff was entitled to recover, the measure of damages was the purchase money with interest from the date of the conveyance." This charge was, we think, wrong.

Whitlock was the drawer of the lot. His deed to Crew, therefore, carried the title to Crew and his assigns, until the grant was issued to Harris, the person entitled to the grant under the forfeiting act. Crew and his assigns held possession under that deed, and that possession was *rightful* until the issuing of this grant. In other words, they received the rents of the land up to the time when this grant issued. It cannot be, then, that Crew can also be entitled to interest on his purchase money, during that same period. The rents for that period must set off the interest for that period.

Here, then, the Court was, we think, in error, and there must be a new trial, unless Crew will remit the interest for the period aforesaid.

KING vs. BARKER.

All the accounts of poor school teachers are to be paid *pro rata*, by the act of 1857 on the subject.

Petition for mandamus, from Forsyth county. Decision by Judge RICE, at February Term, 1859.

This was an application by Elisha King, for a mandamus to be directed to Hubbard Barker, ordinary and commissioner of the poor school fund, for the county of Forsyth, to compel said Barker to pay to petitioner the amount of certain claims and accounts due to him, out of said fund in the hands of said Barker.

The petition alleges that sixteen of the teachers of said county (naming them) had claims for teaching poor children, for the years 1853, 1854, 1855 and 1857, which claims had been audited in the ordinary's office, and received only a *pro rata* share due them—leaving balances unpaid on each of said claims, amounting in the aggregate to two hundred and fifteen dollars; that there are funds in the hands of said Barker, as ordinary and school commissioner, more than sufficient to pay said amount.

The petition further alleges that said claims were duly assigned and transferred to petitioner, who is entitled to receive the amounts thereof; and that he has requested said ordinary and commissioner to pay the same, but he refuses to do so; that said ordinary has in his hands the sum of five hundred dollars, received in the year 1857-'8 from the State and county taxes, appropriated by law to the payment of said claims and others of like character.

Barker, as ordinary and commissioner, answered, that he had in his hands the sum of three hundred and fifty-one dollars and eighty-eight cents, received from the State Treasurer since 1st January, 1859, the proportion of the poor school fund due the county of Forsyth for the year 1858; that there is due from the tax collector of said county about one hundred and ——— dollars, the amount of taxes levied on the county for the payment of teachers for 1858, but which amount has not been paid in.

Respondent further answers that there are in his office teachers' accounts, returned and audited, for 1858, amounting to about eight hundred and twenty-one dol-

King vs. Barker.

lars and thirty-five and one-half cents; that the accounts of teachers for 1853 amounted to.....\$853.13
Funds of that year, paid out, *pro rata*,..... 621.31

Balance unpaid.....\$231.82
For the year 1854—accounts.....\$442.76
Funds “ paid *pro rata*..... 262.49½
Balance.....\$180.28½
For the year 1855—accounts.....\$258.54
Funds “ paid *pro rata*..... 197.60
Balance.....\$ 61.94
For the year 1857—accounts.....\$820.88
Funds paid *pro rata*..... 569.10—251.78

Balance..... \$725.82½
That there were other accounts filed for payment out of said funds, as follows:—
Accounts for teaching in 1849..... ..\$20.35
“ “ 1850..... 90.29
“ “ 1852..... 25.92
“ “ 1854..... 50.68
“ “ 1855..... 15.60 202.84
Aggregate of accounts prior to 1858, unpaid...\$ 928.66½
Accounts for 1858, above stated..... 821.35½

Total unpaid.....\$1,750.02

The answer further states, that on a final settlement with the tax collectors, for the years 1853, 1856 and 1857, respondent received the further sum of \$27.14, which, with the amount received as aforesaid from the State, makes the sum of \$379.02 in his hands, which amount, and also the amount he may receive from the tax collector, levied agreeably to the recommendation of the Grand Jury, as aforesaid, when received respondent is ready to pay out as the Court may order.

After argument, the presiding Judge made the following order:

"On hearing this *Mandamus*, and the response thereto, and argument of counsel: It is ordered and adjudged that Hubbard Barker, Ordinary of said county, do pay out the funds in his hands upon all accounts filed and approved according to law, *pro rata*, to each teacher; and that said Elisha King be paid his rateable proportion of said funds on his claims, according to the act of the General Assembly passed in 1857—Pamphlet Acts, page 9, and other acts on the same subject."

To this order counsel for King excepted, and assigns same as error.

A. J. HANSELL, represented by BROWN and UNDERWOOD.

By the Court.—BENNING, J., delivering the opinion.

The judgment of the Court below was, that the School Commissioner should pay all the accounts *pro rata*, regardless of their dates. Was that judgment right? We think that it was. It followed the plain words of the act of 1857, on the subject. Those words are as follows:—"That all claims for teaching poor children shall be submitted to said Commissioner, who shall have proof touching such service, and he shall allow and pay, when in funds, all claims where, in his judgment under the proof, the service has been rendered and the teacher really entitled to pay, having due regard to the real merits and justice of the claim, whether such service was rendered before or after the passage of this act, or whether such children have been returned or not. Acts of 1857, 10 Sec. 6.

It is true, then, that the judgment pursues the act. It must follow, therefore, that the judgment is right, if the act is valid. What is there to prevent the act from being

Hunt vs. Printup.

valid? Does it divest any vested rights? Was there any right to be first paid vested in any of the poor school teachers? There was none. The fund, at least all of it except a trifle, was raised subsequently to the act—was raised in 1858—and it seems impossible that there can be a vested right to a thing which thing has not come into existence. But even if it were true that there was such a vested right to this fund, it would not be true that the act divesting that right would be invalid unless the right vested under some contract. And there was no contract existing by which the right was acquired. If acquired at all, it was acquired under some general act of the Legislature, as the act of 1852, “to provide for the education of the poor.” Act of 1851-’2, 3.

Judgment affirmed.

HUNT vs. PRINTUP.

An attorney at law is not liable to an action at law who acts *bona fide* in the discharge of the ordinary duty of an attorney, and especially in directing a levy on property which the plaintiff admits in a consent decree subsequently made by a court in chancery, was subject to the payment of this identical debt.

Trespass, from Floyd county. Nonsuit, by Judge HAMMOND, at August Term, 1858.

This was an action of trespass brought by Warrington Hunt against Daniel S. Printup, Esquire, an attorney at law, for unlawfully levying upon and seizing and taking possession of about ten negroes belonging to plaintiff,

under and by virtue of an attachment sued out in favor of one Martin Ketzmiller against Jacob Davault.

At the trial, plaintiff proved by the deputy sheriff and jailer, that the attachment was placed in his hands by Col. Stewart, with instructions to levy the same on the negroes mentioned—the negroes were pointed out by Col. Stewart, (the eleven negroes, at the time they were levied on, were in the possession of the plaintiff, Hunt)—he took the negroes to Rome and put them in jail. Printup, Smith, and Shropshire were the attorneys for Kitzmillier. On his return to Rome with the negroes, witness informed the attorneys that he had made the levy and had the negroes—they told him to hold on to them and keep them safe. Witness put the negroes in jail and kept them there for some time. The attachment is in Printup's hand-writing.

Plaintiff then offered the attachment and proceedings therein, and also a certified copy of the record of a suit in chancery, in the State of Tennessee, in which Martin Kitzmillier was complainant and Warrington Hunt and others defendants.

George H. Davault was sworn on the part of plaintiff, and testified that the negroes were worth ten thousand dollars—were attached in Floyd county in the spring of 1854; they were detained eight or nine months—they were hired before at \$75 per month—witness was interested in them. Witness and General Milligan got possession of the negroes as the agents of the plaintiff and the Bank of Tennessee—obtained possession by paying Printup and Smith two hundred and fifty dollars, and Shropshire one hundred dollars, and costs and other expenses—thinks the damage and loss sustained and money paid out amounted to four or five thousand dollars. Plaintiff paid witness five hundred dollars for aiding as his agent in the matter. Paid Underwood and Mitchell two hundred dollars—paid Kitymiller's lawyers,

Printup, Smith, and Shropshire, \$350, besides other expenses, the amount of which witness does not recollect. Does not know what it cost plaintiff in coming in person to attend to said case—knows the negroes were the property of the said plaintiff, because the plaintiff and witness bought them jointly, and owned them some two years, then witness sold his interest, which was one half, to plaintiff, while the negroes were in North Carolina. All the witness knows about the seizing and detaining of the negroes by defendant, is what transpired when he was in Rome, January, 1855, when he was endeavoring to make a sale of some of said negroes to pay the expenses, in order to get possession of the negroes. The jailer, who was acting as deputy sheriff, came to witness when he was looking at the said negroes and trying to affect a sale, and asked what that maneuvering meant among them negroes, and said the defendant had sent him to see about it. That witness had better see defendant; that it would save trouble and costs. Witness went to see defendant in his office, and asked him by what authority he had sent the deputy sheriff after him? Defendant replied that he had authority, and it was a good deal his business. That he stood responsible for a large amount. Witness replied that he came here as the authorized agent of the plaintiff, and if defendant wished to see his authority, he could shew it to him. Defendant replied that he thought that witness ought to have come to him in the first place, but that witness could go and attend to the business.

He paid the amount stated, of \$350, lawyers' fees; besides court costs and other expenses, which witness does not now recollect. It was something over six hundred dollars. These sums had to be paid before witness could get the possession of the negroes; defendant would not agree to let the case be dismissed, or that the negroes should be carried off without further expense and trouble,

until the fees mentioned, and court costs and expenses, were paid.

Cross-Examined.—Witness answers that he does not know by whom said negroes were actually seized and stopped. Witness was in North Carolina at the time said negroes were taken possession of, and is brother-in-law to plaintiff.

Witness and plaintiff did own said negroes jointly. Plaintiff told witness that he moved said negroes from Tennessee, in order to effect a compromise with the Bank of Tennessee. That he did not owe Kitzmiller anything. Witness sold them and Gen. Milligan signed the bill of sale, as he was authorized to do so by a decree in the chancery court of Tennessee, except four negroes, which were delivered to plaintiff with \$400 or \$500 left after paying the debts and expenses. The chancery court did decree them to be sold for a debt owing to the Bank of Tennessee, and not to Kitzmiller as plaintiff's property. I know nothing about his passing under an assumed name. What I have answered from having heard I state. The remainder of answers are from my own knowledge. It was in defendant's office when the conversation with him took place. Daniel Hieskell and Mr. Browder were present—do not know the others. In January, 1855, do not know where the plaintiff was taking said negroes to, when they were seized first—saw defendant in January, 1855. The negroes were taken the spring before—do not know the precise date. Witness sold some of the negroes in Monroe county, Tennessee, and the proceeds of said sale went to payment of the debt owing to the Bank of Tennessee, and the expenses, lawyers' fees, &c., above mentioned; for which Hunt received a credit on his note, except the \$400 or \$500 which was turned over to Hunt with the balance of the negroes.

Do not know anything more than I have stated about defendant's seizing said negroes—was not in the State of

Georgia when said negroes were attached—do not know where defendant was when said negroes were attached.

Have answered where and when I saw defendant. Said negroes belonged to Hunt. There was first a bill of sale to one half interest in them, and then my bill of sale for the other half. I did not swear in a bill in equity that said negroes were in my possession when they were attached in Georgia—there was one levied on or attached when I was here—a child in my arms at the time, for a claim in favor of Duke, I think, which was afterwards dismissed. The case was settled by paying the costs and fees before stated, and not by paying any portion of the debt, for which they were attached. The proceeds were applied as before stated.

They were not. There was no bill for the same debt, upon which they were attached in Georgia that I can hear of. The sale and proceeds of sale have been answered. Do not know of the parties to the bill of the Bank. Hunt agreed to said settlement, but not satisfied with it. Witness and Milligan were appointed to sell said negroes. Except that of the Bank of Tennessee and what we paid in Georgia, was upon our own responsibility. I owned an interest in said negroes as heretofore stated—bought it from Jacob Davault.

No person, except the persons writing my answers, was present during the taking of my interrogatories. The attorneys, nor none else have ever told me, and said how I should answer these interrogatories. I have been informed that the first was defectively executed, and was sent back to be re-executed, but never reached me, and plaintiff asked me to come in person to court.

Plaintiff then offered in evidence, the attachment, bond, and entries thereon, and closed.

Defendant moved for a non-suit, on the ground that the evidence did not make out a *prima facie* case against him; or one which would authorize the court to submit

it to a jury. The court granted the motion and ordered a non-suit, and plaintiff excepted.

UNDERWOOD & SMITH, for plaintiff in error.

PRINTUP & SHROPSHIRE, *contra*.

By the Court.—McDONALD, J., delivering the opinion.

In looking through the voluminous record before us, we are satisfied that the presiding judge in the court below committed no error in awarding a non-suit in the cause in that court. It appears that the defendant was sued in an action of trespass, for an act performed as attorney at law, in the performance of an ordinary duty, and for aught that appears in the record, his conduct was *bona fide*, without any mixture of intentional wrong; if, indeed, there was any wrong. In the case of *Sedly vs. Sutherland and others*, 3 Espinass Rep. 202, Lord Kenyon said that he "thought the action could not be maintained against attorneys, unless it could be proved that they had gone beyond the line of their duty, by which the plaintiff had suffered. That it would be a case of infinite hardship, if an attorney, who was instructed to use the most effectual means to secure parties suspected, should be subject to actions of trespass, in the fair discharge of his duty." The action in that case was for the arrest of the person; in this, for the levy on property, or directing it, or ordering the officer to hold on to property already levied on. There were statements made by counsel for defendant in error in the argument not found in the record, and therefore not noticed in our judgment; but the evidence adduced by the plaintiff shews that he and his counsel, in a court of chancery in Tennessee, in a consent decree, admitted that the proceedings in this State, alluding to the said attachment, were taken to subject the

slaves levied on, and referred to in said decree to the satisfaction of the Tennessee judgment; and assenting also, that said slaves should be sold, or so many of them as should be sufficient to satisfy said judgment, and admitting the validity of the proceedings here by consenting to a decree that all the costs of the suit which had accrued in the State of Georgia should be paid from the sale of the negroes, the said decree at the same appointing, commissioners to come to Georgia, receive the property and execute that part of the decree.

We think that plaintiff in error, by his own evidence, so far from sustaining his case, shews that he had no ground for instituting the proceeding.

Judgment affirmed.

CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT MILLEDGEVILLE,
MAY TERM, 1859.

Present—JOSEPH H. LUMPKIN,
CHARLES J. McDONALD, } Judges.
HENRY L. BENNING,

PONDER vs. COX.

Equity will not drive a party to common law, when by doing so his rights would be delayed, if not jeopardized.

In equity, in Thomas Superior Court. Decision by Judge Love, January, 1859.

This bill was filed by Carey S. Cox against Ephraim G. Ponder, to enjoin the collection of a judgment at law, obtained against complainant. The bill alleges that complainant, by his agent, Dyson, bought a negro man by the name of Price, or Giles Price, a blacksmith, from defendant, for \$1800; that one of the notes given for the purchase-money, amounting to \$1800, was transferred to

one William Ponder, a brother of defendant, before it fell due, and that judgment had been obtained upon said note, and afterwards said judgment transferred back by William Ponder to Ephraim G. Ponder, the defendant, who is the owner and holder thereof, and that said transfers were made by defendant with a view of preventing complainant from making a defence to said note, the consideration thereof having failed in this, that the negro thus purchased by defendant, and the right and title of which defendant warranted, is not a slave, but is a free person of color.

The injunction was granted, and afterwards, upon a motion to dissolve said injunction, and to dismiss complainant's bill for want of equity, the court refused the motion, but held up the injunction and retained the bill; to which decision Ponder excepted, and upon a writ of error to the supreme court, that court reversed the judgment of the court below, holding that complainant had an adequate remedy at law against Ponder, upon the covenant of title in the bill of sale; but granted leave to complainant to amend his bill, by alleging the insolvency of Ponder, or any other fact that would raise an equity, and show that the remedy at law would be adequate. See this case fully reported in 26 Geo. Rep.

The case being thus remanded to the court below, complainant then moved to amend the bill, alleging, amongst other things, that defendant had recently executed a post nuptial settlement, by which he had conveyed to a trustee, for the sole and separate use of his wife, the whole of his estate, real and personal, consisting of lands, negroes, &c., and that he had no visible property upon which an execution could be levied, even if complainant should recover a judgment at law upon the breach of warranty of title; that defendant had removed from the county of Thomas to the county of Fulton, and that if he had property now that could be reached by garnishment.

or execution, it would be easy for him to remove said property, or to make such disposition of it as would effectually defeat complainant's ultimate recovery at law on breach of said warranty.

Defendant's counsel objected to this amendment, and moved to dissolve the injunction and to dismiss the bill. The court granted leave to amend, and refused to dissolve the injunction or to dismiss the bill. To which decision counsel for defendant excepted, and assigned the same as error.

McINTYRE & YOUNG, and A. H. HANSELL, represented by IVERSON L. HARRIS, for plaintiff in error.

J. R. ALEXANDER, and BURCH & McLENDON, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

We held the court was right in refusing to dissolve the injunction and dismiss the bill as amended by the complainant.

When the case was up before, our judgment was, that the bill, as it originally stood, could not be sustained. We suggested, however, that it might be made a good bill, provided the complainant could allege, under oath, that there was threatened or impending wrong to his rights, by reason of the insolvency of Ephraim G. Ponder, or his removal beyond the jurisdiction of the State.

The amendment shows that Ponder, by a post nuptial settlement, has conveyed the whole of his property to a trustee, in strict settlement upon his wife and offspring, provided there be any, and that he has removed from Thomas to Fulton county. This conveyance, although voluntary, is good against him. True, the trust property may be made subject to contracts existing at the time of the settlement, but under all the facts of this case, should Cox be driven to further litigation, to re-imburse him-

Hendry vs. Smith.

self upon his covenant of title, should he lose the negro? We think not. It would be to deprive his common law remedy of one-half, at least, of its adequacy and completeness. Ephraim G. Ponder is without property; and the legal title to that which he did hold is vested in another.

There is another equity, not formally assumed in the bill, but which the facts stated presented strongly for the consideration of chancery. Long before Cox may be able to get a judgment upon his warranty, this property may be disposed of by the trustee, who holds the legal title, so as to put it beyond the reach of any recovery over, which might be had against Ponder. The injunction in this case, as in many others, subserves the purpose of a *Quia Timet* bill.

Upon the whole, considering there are two proceedings now pending, namely, the application of Price, the negro, to establish his freedom, and the plea of the failure of consideration of the note given by Dyson to Ponder, for the negro, and which is sued on—one or both of which will decide whether it will be equitable or not to collect this judgment out of Cox—it is best to retain the bill and injunction until this matter is decided.

Judgment affirmed.

HENDRY vs. SMITH.

The verdict of a jury on an issue, on a plea in abatement to the jurisdiction of the court, sustaining their jurisdiction, when there was evidence on both sides, will not be disturbed.

Motion for New Trial, in Thomas Superior Court. Decision by Judge Love, February, 1859.

James W. Smith brought suit against William H. Hendry, returnable to the May term, 1854, of the Superior Court of Thomas county. The writ was filed in office *31st December*, 1853. The sheriff returned that he had served the defendant personally, 2d February, 1854. At the term of the court to which the writ was returnable, the defendant pleaded, that at the time said suit was commenced and the writ sued out, he was not a citizen of Thomas county, but resided in the county of Lowndes. This plea was sworn to, and issue made up thereon, and submitted to a jury, whether the defendant was a citizen of Thomas county at the time suit was instituted against him. At June term, 1858, the case came on for trial on the appeal.

The jury found that defendant was a citizen of Thomas county. Whereupon defendant moved for a new trial on the following grounds, viz :

1. Because the jury found contrary to law.
2. Because the jury found contrary to evidence; and that the verdict was strongly and decidedly against the weight of evidence.

The court refused the motion for a new trial, and defendant excepted.

McINTYRE & YOUNG, for plaintiff in error.

A. H. HANSELL, *contra*.

By the Court.—McDONALD, J., delivering the opinion.

There was evidence on both sides of the issue submitted to the jury, and that leaves no doubt on the mind that at the time of the service of the declaration and process on the defendant, and at the time of the plea pleaded he

Dawson & Dawson, Adm'rs, vs. Godkins.

was resident in the county of Thomas, where the suit was instituted. The suit was in the superior court, and the plea should have shown that there was another court where justice could be effectually administered, and, of course, it must appear what court it was which had the jurisdiction at the time of the plea pleaded, for if, at that time, the identical court in which the suit was pending has the jurisdiction, the court will not turn a plaintiff out merely to institute suit in the same court. On an issue of this sort, the time at which the declaration was filed in the clerk's office is of little importance. The act of 1843, defining the time at which an action should be held to be commenced, grew out of a contrariety of decisions in the courts, at the point of time at which the suit should have effect upon a plea of the statute of limitations. But considering the nature of a plea in abatement to the jurisdiction of the court, and the object of it, simply to carry the case before the court, where the cause can be properly tried, which court must be shown in the plea, that the parties may institute the suit there, it is immaterial when the declaration was filed. But there is a conflict in the evidence, as to the residence of the defendant in the case below, when the declaration was filed; and the jury having found that his residence was in the jurisdiction in which the action was brought, the presiding judge in that court did right not to disturb the verdict.

Judgment affirmed.

DAWSON & DAWSON, Adm'rs, vs. GODKINS.

If, in a suit on a promissory note, the statute of limitations is pleaded, and a new promise is proven, the statute which applies to the original demand is the statute which governs.

Assumpsit, in Greene Superior court. Tried before Judge HARDEMAN, March Term, 1859.

This was an action of assumpsit, brought by James W. Godkins, as bearer, against George O. and Lucien W. Dawson, administrators of William C. Dawson, deceased, upon a promissory note made by deceased in his lifetime, dated 3d July, 1835, and payable one day after date to Grant & Hall, or bearer. There was a count in the declaration on a new promise, alleged to have been made within six years from the commencement of the action.

The defendants plead payment, and the statute of limitations. At the trial, plaintiff proved by James H. Hall that he, as the agent of Grant & Hall, presented the note to William C. Dawson for payment sometime in October or November, 1851; that Dawson said he believed the note had been paid off, but he would look over his receipt book and see; that he went up home and returned and promised to pay it. Upon his cross-examination, in reply to the question whether he had not stated in the presence of Oliver P. Daniel, that the above acknowledgment or promise to pay was made in the fall of 1849 or 1850, witness answered that he had been entrapped, and probably had said some such thing, but that his present statement as to the time was the true and correct one.

Upon this testimony plaintiff tendered in evidence the note sued on, to the introduction of which defendants objected, on the ground that the same was, on its face, barred by the statute of limitations. The objection was overruled, and the note read, and plaintiff closed.

The court charged the jury that if the action was brought within *six years* from the date or period of the new promise, (excluding the one year in which the administrators were exempt by law from suit,) then the statute is not a bar. To which charge defendants excepted. The jury found for the plaintiff; whereupon defend-

Dawson & Dawson, Adm'rs, vs. Godkins.

ants tendered their bill of exceptions, and assign as error the decision and charge above excepted to.

GEO. O. DAWSON, for plaintiff in error.

PHILIP B. ROBINSON, *contra*.

By the Court.—McDONALD, J., delivering the opinion.

It is insisted, on the part of the plaintiffs in error, that four years is the statute bar to an action on the promise relied on to remove the bar of the statute in this case; that the promise does not revive the original debt, but that that debt is simply a consideration for the new promise; and that the four years had expired, even adding the year during which the administrators were exempt from suit, before the action was brought, and that the note ought not to have been admitted in evidence. Even on the hypothesis of the counsel for the plaintiffs in error, the note was admissible to prove the consideration of the new promise; but his position is wrong, as was decided by this Court in the case of Beard et al. vs. Simmons, 9th Geo. Rep. 4. The suit in that case was on promissory notes. The statute of limitations was pleaded. The plaintiff proved promises to take the notes out of the statute of limitations, and the Court charged the jury that if a new promise was made at any time within six years next before the commencement of the action, it was good and binding, and should be enforced, and this Court sustained that charge. The Supreme Court of the United States, in the case of Clementson vs. Williams, 8 Cranch 72, held the same doctrine, the Chief-Justice saying that the statute of limitations, which applies to the original demand, is the statute which controls. The charge of the presiding Judge to the jury, in this case, that "if the action is brought within six years from the date or period of the

new promise, the statute is not a bar," is excepted to. This charge accords with the rule above laid down, and is the law of the case.

Judgment affirmed.

OSBORN vs. HERRON.

A sells to B the privilege of making and vending a patented washing machine, in three counties, for which he takes three notes of \$100 each, with the agreement that if these machines had been previously sold in these counties, that the vendor should give up the notes. *Held*, That upon satisfactory proof, that these machines had been manufactured and sold in one of the three counties, the notes were void.

Assumpsit, in Greene Superior Court. Tried before Judge HARDEMAN, at March Term, 1859.

This was an action by Elijah Osborne against David Herron, on the following promissory note:

PENFIELD, September 16th, 1857.

\$100. Six months after date I promise to pay to E. Osborne, or bearer, One Hundred Dollars, value received, with interest from date.

(Signed)

D. HERRON.

The defence was, that the note was given, together with two other notes, each for the same amount, for the exclusive right to manufacture and sell, in the counties of Oglethorpe, Clarke and Jackson, a certain washing machine which plaintiff or his assignors had patented, and that the consideration had failed, in this, that said washing machine had been sold, and was in use, in some or

all of said counties. And in support of this plea, defendant offered the following evidence:

Francis Herron, defendant's son, testified that he was present when his father gave to plaintiff three notes, the consideration of which was the right to sell washing machines in the counties of Clark, Jackson and Oglethorpe; plaintiff stated that there was no other agent in these counties, and that the machines had not been offered for sale in these counties. Defendant said he would have the machines made in Athens. Plaintiff said they had not been manufactured in Athens. Does not know that the three notes were each for \$100, nor when the notes were due.

Virgil Herron, son of defendant, testified that he was present when defendant gave the notes to plaintiff, one of which was the note sued on. The notes were given for the right to sell washing machines in the counties of Jackson, Oglethorpe and Clarke. Defendant said if the machines had been sold in these counties he would give up the notes.

Lewis J. Lampkin, examined by commission, deposed that he sold a washing machine, which he levied on as the property of Samson D. Bridgman, in Clarke county sale made in the town of Watkinsville, in the spring of 1857. Don't recollect distinctly whose patent it was, but thinks it was Hollingsworth patent. Knows of no machines of the kind having been sold in Jackson and Oglethorpe counties. Bridgman offered to sell machines of the same kind frequently, in the town of Athens, previous to September, 1857. Said machines did not give general satisfaction.

John Kirkpatrick, examined by commission, swore that several washing machines, purporting to be Hollingsworth patent, were manufactured in Athens, in the county of Clarke, before September, 1857, and were offered for sale by S. D. Bridgman; don't know of any being offered

for sale in Jackson or Oglethorpe counties; don't know how many were sold; witness bought one; the machines did not give satisfaction; never heard any one say they were pleased with them in Athens.

Defendant closed.'

Plaintiff then proposed to prove, by Philip B. Robinson, his attorney-at-law, that a short time after said note, together with two other notes, all bearing the same date, was given by plaintiff, they were left with him for collection. That defendant called upon him and stated that the consideration of one of the notes had failed, and that upon complaint to plaintiff, he had directed him, the defendant, to call upon said Robinson and get one of said notes; that he delivered to defendant one of said notes, and defendant expressed himself satisfied with his contract as to the counties of Oglethorpe and Jackson, and that he would pay the note now in suit, and asked for time. Defendant's counsel objected to the competency of Robinson, on the ground that he was the attorney-at-law of plaintiff. The Court sustained the objection, and repelled the testimony, and counsel for plaintiff excepted.

Plaintiff then introduced and read in evidence one of said notes—the same given up by Robinson to defendant, and produced under notice.

The jury found for the defendant, and plaintiff moved for a new trial on the following grounds:

1st. Because the court refused to admit the testimony of Philip B. Robinson, the attorney-at-law of plaintiff in the case.

2d. Because the verdict is contrary to law.

3d. Because of newly discovered evidence material to plaintiff's case, and not known at the trial.

The Court overruled the motion for a new trial, and defendant excepted.

PHILIP B. ROBINSON, for plaintiff in error.

By the Court.—LUMPKIN, J., delivering the opinion.

The Court was right in rejecting the testimony of Mr. Robinson in this case. The notes of Herron were put in his hands for collection. He does not state that he took and held as the agent, and not as the attorney-at-law of the payee. The presumption of law is, that he received them in the latter character. If so, it is clear that the conversation and transaction as to one of the notes, transpired while the relation of client and attorney subsisted between Osborn and the witness; and, we may add, grew out of his professional employment by the plaintiff. His evidence was, therefore, in letter and in spirit, obnoxious to the statute.

Apart from this proof, then, how stands the case? Herron gave Osborn his three notes, for \$100 each, for the privilege of selling Hollingsworth's patented washing machine, in the three counties of Jackson, Clarke and Oglethorpe, with the understanding that if these counties had been pre-occupied, he would deliver up the notes. The testimony is abundant and uncontroverted, that Clarke, one of the counties, had been previously occupied by a man by the name of Bridgman. He manufactured the machines in Athens. John Kirkpatrick had bought one of them, and pronounced them not very good; and Lewis Lampkin had sold one or more of them at Watkinsville, as sheriff. By the agreement, then, the notes were void. One of the notes was found, at the trial, in the possession of Herron. Excluding the testimony of Robinson, it does not appear how he came by it. The presumption is he had paid it. I speak from the record as a Judge, not as a man. One of the notes is yet behind. Upon the principles of an equitable apportionment of the price, which, perhaps, does not apply to such a case, as the pur-

chaser has lost the benefit of the sale of his machines in Clarke, one of the three counties, the notes sued on should not be collected.

Judgment affirmed.

THE GEORGIA RAIL ROAD AND BANKING COMPANY *vs.* WILLIS.

The proof was, that a man's cattle were killed by a Rail Road train, and that the agent of the Rail Road Company, when applied to for pay for the cattle, offered to pay for them, which offer, however, was, from being deemed inadequate, rejected.

Held, that this proof was sufficient to cast on the Company the *onus* of proving that the killing of the cattle was not the result of negligence.

Trespass, in Greene Superior Court. Tried before Judge HARDEMAN, at March Term, 1859.

This was a proceeding, under the statute, to recover the value of four cows, alleged to have been killed by the cars.

At the trial the plaintiff proved that four milch cows, belonging to the estate of his intestate, were missed on the 7th of July, 1857, and were found dead near the Rail Road track on or about the same day, and that they were worth about twenty-five or thirty dollars each; that when he complained to the agent of the Rail Road about killing the cows, he offered to pay him twenty-five dollars for three of them, and fifteen dollars for one, which he refused to take.

Here plaintiff closed, and defendant moved for a non-suit, on the ground that plaintiff had failed to show that

the cows had been killed by the carelessness, negligence or improper conduct of the Rail Road Company, its agents or employees. The Court refused the motion to nonsuit, and defendant excepted.

The Court charged the jury that if they believed, from the evidence, that the cows were killed in consequence of the carelessness, negligence, or improper conduct of defendant, or its officers, agents or employees, in running the cars on the road, plaintiff was entitled to recover the value of the cows. But if they believed the killing was not the result of careless or improper conduct on the part of defendant or its agents, then the defendant was not liable; and whether defendant was guilty of negligence or not, was a question entirely for the jury to determine.

The jury found for the plaintiff one hundred and twenty dollars; whereupon the defendant moved for a new trial, on the following grounds:

1st. Because the Court erred in refusing to grant the motion for nonsuit.

2d. Because the verdict was contrary to the evidence.

3d. Because the verdict was contrary to law.

4th. Because the verdict was contrary to the charge of the Court.

The Court overruled the motion for a new trial, and defendant excepted.

PHILIP B. ROBINSON, for plaintiff in error.

G. O. DAWSON, *contra*.

By the Court.—BENNING, J., delivering the opinion.

Was the Court below right in refusing the motion for a nonsuit? We think so.

The ground of the motion was, that the evidence did not show that the killing of the cows was the result of carelessness or negligence in the Rail Road Company.

We incline to think that the mere fact that the Company's train killed the cows, was sufficient to raise the presumption that the killing was the result of negligence in the Company's servants. When one man kills another, the law implies malice in the killer; so if one man kills another's cattle, ought there not, in like manner, to be an implication of malice or negligence in the killer.

Indeed there is, perhaps, more reason to require the implication in the latter case, than there is, to require it, in the former. Our statute makes it the duty of all persons to keep a fence, of a certain kind and height, and it declares that if any person shall kill any other person's cattle trespassing on land not enclosed by such a fence, he shall pay for the cattle so killed. (Cobb, 19.) We may assume that the Legislature thought that such a fence as this would be sufficient to keep out cattle. Consequently, it would seem that the mere fact that one man's cattle are found trespassing on another's land, ought to be sufficient to require the presumption that the fence of the latter was a fence inferior to that which the statute prescribes.

We incline, then, to the opinion, that the mere fact that the train killed the cows, was sufficient to raise the presumption that the killing was the result of negligence in the Company's servants. Of course such a presumption would be one subject to rebuttal.

There was, however, in the proof, more than this mere fact. The agent of the Company, when applied to for pay for the cattle, did not deny the liability of the Company to pay for them; did not insist that in the killing of them the Company's servants were free from fault. On the contrary, he offered to pay for the cattle, and the only reason why he did not pay for them was, that he did not offer for them as much as was demanded.

This, and the other fact, the fact of the killing, were

Diomatari vs. Choate, et al.

sufficient, we think, to make a *prima-facie* case of negligence in the Company's servants.

Hence, we think that the judgment overruling the motion for a nonsuit was right.

If there was evidence enough to prevent a nonsuit, there was evidence enough to support the verdict, for the evidence before the jury was the same that had been before the Court. Therefore we have to think that the second and third, and fourth grounds of the motion for a new trial were also insufficient.

The first ground was the refusal of the Court to grant a nonsuit. This ground seems not to be suitable for a motion for a new trial; but if it is, it has already been considered, and found insufficient.

Judgment affirmed.

DIOMATARI vs. CHOATE ET AL.

Notwithstanding the court may differ with the jury as to the preponderance of the proof, yet the verdict will not be disturbed upon a naked question of fact, provided there be sufficient evidence to support the finding; especially when the circuit judge is satisfied and refuses to grant a new trial.

In Equity, in Putnam Superior Court. Tried before Judge HAMMOND, March Term, 1859.

John D. Diomatari filed his bill against Thomas W. Choate, Uriah Ward, and John W. Caswell, to enjoin an action at law, brought on a judgment, formerly obtained against said Diomatari and Edward C. Clarke, as partners under the style and firm of Clarke & Diomatari. The bill,

in substance, stated that, in February, 1843, Choate, then of the county of Jones, sold to Clarke & Diomatari, a lot or parcel of land, in the county of Jones, on Commissioner's creek, containing about thirty-three acres, and on which was a mill, for the sum of about thirty-five hundred dollars, in three payments; and that Choate executed his bond to make titles to said premises upon the payment of the purchase-money. That Clarke & Diomatari becoming embarrassed, and not able to pay for the place, agreed to surrender it, upon Choate giving up all the demands and claims which he held against them; and the trade for the purchase of said land and mill-seat was canceled, and Choate took possession of the same. That in addition to the notes for the purchase-money of said premises, Choate held two other notes against Clark & Diomatari, amounting to about three or four hundred dollars, and that these notes, as well as those given for the mills and land, were included in the contract for rescission, and were thus settled and paid off. Before this agreement to rescind, Choate had commenced suit upon one of the land notes, amounting to about \$1100, and upon the two small notes above referred to; and by some oversight or neglect, said suit proceeded; and at January term, 1845, of Jones superior court, he obtained judgment against Clarke & Diomatari for \$1,463 00 principal, and \$192 71 interest. But no attempt was made to enforce said judgment, or any claim or pretence that the same, or any part thereof, was due, until lately, when said Choate having transferred the same to Ward and Caswell, they have commenced an action of debt thereon against complainant as the surviving partner of the firm of Clarke & Diomatari, and are seeking to recover the full amount thereof from him. The bill prays for an injunction, &c.

To this bill defendant, Choate, filed his answer, admitting the facts as charged in relation to the sale of the mills, the giving of the notes for the purchase-money, and

the rescission of the contract, but denying that the two small notes referred to and sued on, and constituting a part of said judgment, were to be relinquished or were included in said arrangement, but insisted that only the land notes were to be canceled or given up in exchange for the land; and that it was agreed by Clarke that defendant should go on and obtain judgment on the entire claim; and hold the same, as security for the payment of the part thereof founded upon the two small notes.

Defendants, Ward and Caswell, answered that they knew nothing of the original transaction between the parties, or the consideration of the notes upon which the judgment is founded, and only want what is fairly and justly due them thereon.

The case was submitted to the jury, upon the bill and answer and proofs, who returned a verdict, perpetually enjoining the judgment sought to be recovered at law, except so far as relates to the two notes, one for \$120 00, and the other for \$248 00.

Whereupon complainant moved for a new trial, on the following grounds:

1. Because the verdict is decidedly and strongly against the weight of evidence.

2. Because the charge of the court, that one partner has a right to bind the firm for all matters within the scope of the partnership, though correct as a general proposition, had no application to the facts of the case, and that the court erred in refusing to charge as requested, that if the jury should find that the consideration of the two small notes was personal to Clarke, and known so to be by Choate, and not on account of a partnership debt or liability, then they should perpetually enjoin said action at law as against Diomatari.

3. Because the verdict was contrary to law and the evidence.

The court, after argument, refused the motion for a new trial, and counsel for complainant excepted.

JUNTUS WINGFIELD, for plaintiff in error.

W. McKINLY, and HUDSON, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

The only question argued before this court is, was the verdict in this case so strongly and decidedly against the weight of evidence as to make it our duty to grant a new trial?

The circuit judge thought not; and this constitutes an additional reason why we should not interfere. For myself, I should have rendered a different verdict upon the testimony; still, I think there was sufficient proof to warrant the finding.

Our conclusion is somewhat reluctantly to let the judgment stand.

Judgment affirmed.

MORTON *vs.* PEARMAN.

By the act of 1857, "authorizing attachments to issue in cases sounding in damages," attachment lies on the demand for a breach of a promise of marriage.

Attachment, in Jones Superior Court. Decision by Judge HARDEMAN, April Term, 1859.

This was an attachment sued out by Sarah J. Pearman against Ezra D. Morton, to recover damages for the breach

of a marriage contract. The damages were laid at five thousand dollars, and the attachment predicated upon the ground that defendant "*absconds*."

At the term of the court to which the attachment was returnable, defendant moved to dismiss the same, on the ground that an attachment would not lie for the recovery of damages for the breach of a marriage contract.

The court overruled the motion, holding that an action by attachment was maintainable in such case, to which decision counsel for Morton excepted.

RUTHERFORD & HILL, for plaintiff in error.

DAVIS & LAWSON, and ISAAC HARDEMAN, *contra*.

By the Court.—BENNING, J., delivering the opinion.

Was the court below right in overruling the motion to dismiss the attachment? We think so.

The ground of the motion was, that attachment does not lie in a case for the breach of a promise of marriage. The validity of the ground depends on the import of the expression, "money demands," contained in the act of 1857, authorizing attachments to issue "in cases sounding in damages" (acts of 1857, 23). That act is in the following words: "That from and after the passage of this act, in all cases of money demands, whether arising *ex contractu* or *ex delicto*, plaintiffs shall have the right to sue out attachments when defendant shall have placed himself in such situation as will authorize plaintiffs to sue out attachment, upon the plaintiffs complying with the statutes, now in force, in relation to issuing attachments."

Is the demand arising from the breach of a promise of marriage, a "money demand?" We think it is. It is a demand for money, and not a demand for anything else. It is not a demand for specific performance. Neither

party to such a promise has the right to a decree for the specific performance of the promise. True, the *amount* of the demand is uncertain, is unliquidated, but that does not prevent it from being a demand for money.

Being a money demand, then, it is within the *words* of the statute.

Is it not, also, within the *reason* of the statute? We think it is. The old law provided for all cases of certain—of liquidated money demands. Therefore, the object of the new law must have been provision for uncertain, unliquidated, money demands. To say otherwise, is to say that the legislature intended, by the statute, what was unnecessary and useless.

There was not, then, we think, any validity in the ground of objection to the attachment.

Judgment affirmed.

NOTE.—This was the last Court at which Judge McDonald presided. He resigned before the meeting of the court at Athens, on the 4th Monday in May, and Linton Stephens, Esq., of Sparta, was appointed by the Governor to fill the vacancy.

CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT ATHENS,
MAY TERM, 1859.

Present—JOSEPH H. LUMPKIN,
HENRY L. BENNING,
LINTON STEPHENS, } Judges.

CATO *vs.* GENTRY ET AL.

A pecuniary legacy to infant wards, payable when they become twenty-one, was charged on lands. The devisees of the lands, paid the legacies to the guardian, before the wards became twenty-one. Afterwards, the devisees sold the lands. *Held*, that the lands, in the hands of the purchaser, remained charged with the legacies.

In Equity, in Hancock Superior Court. Decision by Judge THOMAS, October Term, 1858.

This was a bill filed by William P. Cato and James F. Cato against Samuel T. Gentry, Sterling G. Cato and Lewis F. Cato, executors of the last will of Green Cato, deceased. Green Cato died in 1838, after having made

and executed his last will, dated November 14th, 1837. In the 3d item of said will he makes the following devise and bequest: "At the time of lawful age or marriage of my youngest daughter, Emily Cato, or on the marriage of my wife, should such an event take place, I give, devise and bequeath to my two sons, Sterling G. Cato and Lewis F. Cato, all of my real estate of which I die seized and possessed, consisting of the homestead plantation, of 1170 acres, be the same more or less, upon condition that they are to pay to the two sons of William P. Cato, now deceased, three hundred dollars to each of my said grandsons on arriving at the age of twenty-one years, hereby charging my said real estate with the payment to my said grandsons of three hundred dollars each, provided each shall live to arrive to the age of twenty-one years. Should one of my grandsons die before the age of twenty-one years, in that event I desire the survivor to receive the legacy of six hundred dollars. Should both die before the age of twenty-one years, it is my intention for said sums not to be paid."

Sterling G. and Lewis F. Cato went into possession of the land after the death of the testator, and afterwards sold the same to Samuel T. Gentry. In March, 1837, James W. Cato was appointed guardian of the grandsons. During the minority of complainants, the devisees made their promissory note to James W. Cato, guardian of the grandsons, for the sum of six hundred dollars. Suit was brought on said note and the amount received and paid to the guardian. At the arrival of age of the grandsons, suit is brought by bill against Samuel T. Gentry to recover the amount of the legacy charged upon the land. Pending suit, Sterling G. and Lewis F. Cato were made parties defendants with Samuel T. Gentry. The defendants plead payment to the guardian of the wards, and complainants demur to the plea on the ground that the legacy to the minor did not vest until the wards arrived

at full age, and a payment to the guardian before that time did not discharge the liability of Samuel T. Gentry. The court overruled the demurrer, and charged the jury that the payment to the guardian operated as a discharge. Upon this ruling error is assigned. The jury found for the defendants.

E. H. POTTLE, for plaintiffs in error.

A. H. STEPHENS and R. TOOMBS, for defendants in error.

Judge STEPHENS, having been formerly of counsel in this case, did not preside.

By the Court.—BENNING, J., delivering the opinion.

The legacies to the two minor grandsons were not due when they were paid to the guardian of those grandsons. The legacies were a charge on the land devised to the two sons, Sterling G. Cato and Lewis F. Cato, the persons who paid to the guardian the legacies. The two sons afterwards sold the land to Gentry, who, of course, took the lands subject to the charge on them, of the legacies, if that charge had not been satisfied, by the payment of the legacies to the guardian. That payment was voluntary; promissory notes for the legacies were given and taken, voluntarily.

The question, therefore, is, did the payment, under these circumstances, satisfy the legacies? If it did, the plea of payment was good, and the decision of the court below right; if it did not, the plea was bad, and the decision wrong.

The payment satisfied the legacies, if the act of payment was binding on the minor wards; the payment did not satisfy the legacies if the act of payment was not binding on them. Was that act, then, binding on them?

It seems to be a principle of law, that an act of this

Hall vs. Bragg.

kind is binding on the ward if it turns out to be advantageous to him, and it is not binding on him if it does not so turn out. Story says: "But if an estate is charged with a sum of money, payable to an infant, at his majority, then, the purchaser is bound to ~~see~~ the money duly paid on his arrival at age; for the estate will remain chargeable with it, in his hands,"—*Stor. Eq. Jur.* § 1133. And this position, we think, is supported by the authorities.—See *Dickerson v. Dickerson*, 3 Bro. C. C. and note; 2 Sug. Ven. and Pur. 102–105–100; 14 Ves. 273, *Eq. Dig.* "guardian" III; *Macpherson on Inf.*, 272 *et. seq.*

Under these authorities, we think the act of payment was *not* binding on the wards; consequently, we think, that the decision was wrong.

Judgment reversed.

HALL vs. BRAGG.

George Bragg made an instrument, in the form of a deed, which witnessed as follows: "That the said George Bragg, after his burial expenses and the payment of all just debts, in consideration of the love and affection which he has and bears to his said sons-in-law, J. T. Hall, and J. Jones, and son, T. Z. Bragg, hath given, granted and conveyed, and does, by these presents, give, grant and convey, unto 'them' all the property that he, the said Bragg, owns and is possessed of." *Held*, that the instrument was a will, and not a deed.

Caveat, in Madison Superior Court. Tried before Judge THOMAS, March Term, 1859.

At the trial upon the appeal, the following paper was propounded for record and probate as the last will and testament of George Bragg, deceased, viz:

State of Georgia, } This indenture, made this, the
 Madison County. } 17th day of July, 1857, between Geo.
 Bragg, of the above State and county, of the one part,
 and Jeremiah T. Hall, son-in-law, of the same place, and
 Jefferson Jones, son-in-law, and Thomas Z. Bragg, son,
 of the State of Mississippi, Newton county, of the other
 part, *witnesseth*, That the said George Bragg, after his
 burial expenses and the payment of all just debts, in con-
 sideration of the love and affection which he has and
 bears to his said sons-in-law, J. T. Hall and J. Jones, and
 son T. Z. Bragg, hath given, granted and conveyed, and
 does, by these presents, give, grant and convey, unto said
 J. T. Hall and J. Jones, sons-in-law, and T. Z. Bragg,
 son, as aforesaid, and their heirs and assigns, all the prop-
 erty that he, the said George Bragg, owns and is possessed
 of at his death, except thirty dollars, which he gives to
 Lucy Parlee, the youngest child of Pamela Tucker; all
 the rest unto the said J. T. Hall and J. Jones, sons-in-
 law, and T. Z. Bragg, son, to have and to hold, and for
 their own use and benefit forever in fee simple.

GEORGE BRAGG, [SEAL.]

Signed and sealed in the presence of

Attest: Wilson P. Berryman.

his

William -- Hall,
 mark.

R. M. Brown.

After proving the execution of the paper by the sub-
 scriber's witnesses, the propounder tendered it in evi-
 dence as the last will and testament of George Bragg,
 deceased. Counsel for caveatrix objected to the intro-
 duction of the paper, on the ground that it was not a will,
 but a deed, and as such, not the subject of record and
 probate in a court of Ordinary. The presiding judge
 sustained the objection and excluded the paper, and coun-
 sel for propounder excepted. The jury found for cavea-

trix, and counsel for propounder tendered their bill of exceptions, assigning as error said decision.

T. M. DANIEL, and G. NASH, for plaintiff in error.

HESTER & AKERMAN, *contra*.

By the Court.—BENNING, J., delivering the opinion.

Was the paper a deed or a will? The court below held that it was a deed, but we think that it was a will. If it was a paper that took effect, that passed any interest, at the time of its execution, it was a deed; if it was a paper that did not take effect, that did not pass any interest, until the death of its author, it was a will. This may be assumed.

If the words, "at his death," be construed as relating to the words of gift, the paper is, clearly, a will. I give at my death, nothing passes till my death. This is clear. And those words may be so construed. The sentence will readily admit the pause of a comma, before them, after "*possessed of*;" and the sentence, when read with that slight pause, will require the words to be construed, as relating, not to "*owns and is possessed of*," but, to he "*hath given*," he "*does give*." The objection to this construction is, that it makes the words relate to words some distance off, when there are nearer words to which they might relate. But this is, by no means, an insuperable objection. The English rule, that words the nearest to each other, in place, are the closest to each other in relation, is one often not true, and, therefore, one often to be disregarded in construction. The rule is not true in any case in which the application of the rule would render the sentence or expression absurd. Would the application of the rule in this case render the expression absurd? Let us see. Turning the expression into the first person, for the sake of clearness, and reading the words, "*at his*

death," as related to the nearest words, "*owns and is possessed of*," the expression will stand thus: I have given, and I do give, to Hall, Jones and Bragg, all the property which I, at my death, own and am possessed of. *Own and am possessed of* are in the present tense; consequently, they will admit before them the word now. Insert that word. The expression will then stand thus: I have given, and do give, to Hall, Jones and Bragg, all the property which I, at my death, now own and am possessed of. And here we have a plain absurdity. *Now*, and *at my death*, are treated as synonymous. And it is impossible that the present can be the future, or the future the present. Then, it would seem, that the application of the rule in this case would render the expression absurd.

On the other hand, if we read the words, "at his death," as relating to the more distant words, the words of gift, we have an expression that is common in wills, and one that has a well understood meaning. I do, at my death, give all of my property to A. B. is a kind of expression, common in wills, and, one having a meaning well understood. That meaning is, I give, to take effect at my death. This is the well understood meaning, although, it must be admitted, that the form of the expression is one not the best adapted to convey this meaning.

We rather think, then, that the words, "at his death," are to be construed rather as relating to the words of gift, than as relating to the words "*owns and is possessed of*." But concede that in this we are wrong, and that the reverse should be the construction, would that vary the result? would that make the instrument a deed and not a will? Reversing the construction, the expression may take this form (the first person being again substituted for the third:) I have given, and I do give, to Hall, Jones and Bragg, all the property which I, at my death, own and am possessed of. Now, what is the intention indicated here? Plainly this: That nothing whatever shall

Neal vs. Todd & Killebreed.

pass, till my death; and that, at my death, all the property, then remaining, shall pass. And this is the very essence of a will as contra-distinguished from a deed. In a deed, the intention is, that something shall immediately pass on the execution of the deed.

Even then, if we take the latter construction, the result, we think, must still be the same; namely, that the instrument must be considered a will, and not a deed.

Consequently, we think that the court below erred in excluding the instrument from the jury.

Judgment reversed and new trial granted.

NEAL vs. TODD & KILLEBREED.

The acts of 1764 (Cobb, 725,) and 1765, (Cobb, 727,) against gaming, constitutional and valid, and of force in this State.

Debt, for money won at cards, in Glasscock Superior Court. Decision by Judge THOMAS, February Term, 1859.

This was an action of debt brought by William M. Neal against William Todd and Jeremiah Killebreed, to recover money won at cards by defendants of John P. Bagget and Robert L. Niblet, under the provision, and by virtue of the act of 25th March, 1765, and the several acts passed before that time.

The defendants demurred to the declaration, on the ground that the acts referred to and under which the action is brought are not of force in this State, and that no suit can be maintained thereon. The court sustained the demurrer and dismissed the action, and plaintiff excepted.

E. H. POTTLE, for plaintiff in error.

WASDEN & NELMS, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

This is a statutory action founded on the Provincial Acts of 1764-5; the former passed the 29th of March, 1764, and the latter the 25th of March, 1765, and the only question to be decided is, are these acts in force in this State?

The act of 1764 was to continue for the space of seven years, and from thence to the end of the next session of the General Assembly, (Watkins' Digest, 98.) The act of 1765 was to be in force for six years and to the end of the next session of the General Assembly, and no longer (Watkins' Digest, 113.) By act of September, 1773, (Watkins' Digest, 189,) these acts were further continued for one year and to the end of the next session of the General Assembly. When the next General Assembly met, after September, 1774, the early compilers of our laws and the historians of our State are at variance. Watkins says: The next General Assembly was held in 1777. If that be so, of course the statutes were in force in May, 1776, and were embraced in the adopting statute of 1784 (Watkins' Digest, 289.) McCall and White both assert that the General Assembly met in January, 1775. (2, McCall's History of Georgia, p. 31; and White's Historical Collections, 50.) The difficulty attending that period make all statements doubtful and uncertain as to what did or did not transpire from the year 1773 up to 1777. But, in our judgment, the question under consideration does not depend upon the settlement of the point in dispute.

These acts were revived by the act of 1777; (Watkins' Digest, 202,) again in 1778, (Watkins' Digest, 231,) and beyond all controversy in 1781, (Watkins' Digest,

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239.) For that act revives and declares to be in force "the several laws theretofore made in the then province of Georgia—and also all laws made and passed by the several conventions, congresses and houses of assembly of the State of Georgia (and not repealed by that or any former house,) except those which are repugnant to the constitution." "These acts were never *repealed*; they were not repugnant to the constitution of February, 1777. Again the act of 1783 declared all laws adopted prior to 1778, designed to suppress one of the monster evils of the world, to be in full force and so continue until repealed—which were not repugnant to the constitution, or *in their nature temporary*. (Watkins' Digest, 281.) Can the acts of 1764–5 be said to be temporary in their nature? Surely not. These or similar acts have always existed in this and the other States of the Union, as well as in great Britain. They are peculiar to no age or country.

Our conclusion then is, that the validity of these statutes does not depend upon the adopting act of 1784, though we are quite confident they will be found covered by that act when the records of the past are searched up and the whole truth ascertained. In other words, we believe they were in force in May, 1776, and had been for ten years before that time. But we hold that the onus is changed; and that those who wish to get rid of them must show their *repeal* since 1783. They are certainly, if not adopted, not repealed by the adopting act of 1784.

But it is insisted that the acts of 1778, 1781, 1783 and 1784 are all unconstitutional in this, that they adopt previous statutes *en masse*, contrary to the VIIIth section of the constitution of 1777. (Watkins' Digest, 9.) If this court has failed to establish the negative of this proposition in the case of the Bibb County Loan Association vs. Richards, (21, Ga. Rep., 592,) to which no allusion was made in the argument, then for myself I despair of doing

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so, and here I leave the subject. The lives, liberties and property of the people of Georgia have been protected, and controlled by the general adopting statute of 1784 for seventy-five years, and now a grave discussion is had as to its constitutionality!

Again, it is urged with earnestness that the acts of 1764-5 are penal in their character, contrary to the genius of our government and the constitutions of the United States and our State; are obsolete and necessarily repealed by the Penal Code of 1833. If these assumptions be well founded, the men of the revolution, who passed those acts, were greatly wanting either in patriotism or perspicuity; and their descendants are no better. That a man who wins money or property from another should not be permitted to keep it, but that the law should enable the loser to recover it back; and if he refuses or neglects to do so, then any other person. We confess we see nothing in this in conflict either with the genius of our government or our Federal or our State Constitution. And if, after the sharper is thus compelled to disgorge his ill-gotten gains, he is made amenable on the criminal side of the court for the offence of which he has been guilty, how does this provision of our Penal Code and the evil remedy interfere with each other? A thief steals my horse or slave and is tried and convicted of larceny. Does that satisfy the ends of justice? No; but I am entitled to my property or its equivalent.

Finally, it is contended that there are and can be no competent parties to the action. That there is no such organization as the "Poor of the Parish," for whose use one-half of the recovery is to be appropriated. That the "Poor of the Parish" are not susceptible of ascertainment; and that this difficulty cannot be obviated by the doctrine of *Cypres*, nor by the statute of Elizabeth, nor by the inherent powers of a court of Chancery.

The law provides that the *whole amount* of the money

lost shall be recovered by the plaintiff in an action of debt. Here then is his warrant for recovering the *whole*; what is to become of it afterwards is not a question for the public. He cannot hold it, and if the law, as it now stands, is so deficient that one moiety can be applied, there being no other owner, it goes to the State, and she may declare what disposition shall be made of the fund.

I want simply to say, in conclusion, that the act of 1764, (Watkins' Digest, 100; Prince, 221,) as to the duty of executors and administrators, courts of ordinary, guardians, &c., stands precisely upon the same footing as the statutes we have been examining. This act was to continue in force for the space of seven years and from thence to the end of the next session of the General Assembly and no longer. Was further continued by the act of 1773; and if the statutes against gaming expired before 1777, and were not revived by the subsequent acts of 1778, 1781, 1783 and 1784, then this foundation act as to the law of executors and administrators, guardians, courts of ordinary, &c., is obsolete and void; and if these adapting acts are unconstitutional as to them, they are equally so as to it. Watkins, who compiled our first Digest, in 1800, took a prominent part in the councils of the State in 1796. He had attained to mature manhood at that time, and must have been cotemporary with the legislation which we have been reviewing. Marbury and Crawford compiled their digest in 1802. The opinions of these men are certainly worth something. The republication of these acts in every Digest since, by authority of the law-making power and the universal acquiescence in them, for sixty years, by the people and the profession, should, in my humble opinion, have rendered this investigation unnecessary. There have been giants in Georgia, both at the bar and in the counsels of State, and it

behooves us, if we would be respected by our posterity, to manifest a becoming reverence for the teachings of our fathers.

Judgment reversed.

VANDERZER, ADM'R vs. McMILLAN.

1. It is the right of the complainant to amend his bill in matter of form or substance at any stage of the cause that he may see fit; and if the effect of the amendment be to destroy the bill, the defendant must take advantage of it by demurrer, or a motion to dismiss.
2. A complainant cannot waive an answer from the defendant; but to every bill, it is the privilege of the defendant to file an answer, and to use the same as testimony, or for the purposes of a cross-bill, or any other purpose sanctioned by the usages and customs of courts of equity.

In Equity, in Elbert superior court. Decision by Judge THOMAS, March Term, 1859.

This was a bill filed by Robert McMillan against Wm. T. VanDerzer, administrator of Ira Christian, deceased, and others. Complainant moved to amend his bill by striking out all that part which sought a discovery from the defendants, and to insert a waiver or disclaimer of any discovery or answer as to the charges and allegations of the bill. Defendant objected to the amendment. The presiding judge overruled the objection and granted the motion to amend. To which decision counsel for defendants excepted.

HESTER & AKERMAN, for plaintiff in error.

ROBT. TOMBS & T. R. R. COBB, *contra*.

Judge STEPHENS, having been of counsel in this case, did not preside.

By the Court.—LUMPKIN, J., delivering the opinion.

As to the right of the complainant to amend his bill, in the manner proposed, or any other, there can be no doubt, even if the necessary effect be to turn him out of court by demurrer or motion to dismiss, on the part of the defendant. A party seeks the specific performance of a contract concerning land. It does not appear from the bill itself, whether the agreement was in writing or not. Leave is asked and granted by the court to amend the bill, so as to allege, that the agreement was by parol. Can the defendant object to the allowance of the amendment because it will destroy the complainant's case? Certainly not. He must abide his time and demur to the bill as amended, or move to dismiss it for want of equity, when he is entitled to be heard. And he is the last person to object in advance to this action on the part of the complainant. We are at no loss, therefore, in affirming the judgment of the court below.

But we are requested to express our opinion upon the main question argued; and that is, whether the complainant, by waiving his claim for discovery, can prevent the answer from being used by the defendant as testimony; and not as pleading merely?

All writers on equity, assert that every bill is, in reality, a bill of discovery.—Story's Eq. Pl. § 31–311; Mitford's Eq. Pl. 53; Wigram on Discovery, 6.

In every treatise on equity pleadings, the interrogatory part is treated as an indispensable part of the bill.—Story's Eq. Pl. § 35; Adams' Eq. 59–302. The office of the sub-

pœna is to require the defendant to answer on oath, like a witness.—6 Bacon's Abr. Art. ch. (6) note (b) on page 686; Bouvier's Law, Dic. Art. Subpœna; 1 Harrison's ch. 195.

The forms of subpœna in the books require the defendant to answer.—1 Harrison's Ch. Pr. 195–6.

The equitable jurisdiction of chancery is founded on the writ of subpœna.—Adams' Equity, 36, 308, 2; Bac. Abr. 685 Ar. Court of Chancery, (6) 1 Harrison's Chancery, 14; Jacob's Law Dictionary and Bouvier's Law Dictionary, *supra*.

The invention of this writ is complained of by the commons as a subtlety of John D. Waltham in 1415 and 1421.—Bacon, Adams and Harrison, *supra*; 3 Black. Com. 512.

Lord Chancellor Eldon, in *Evans vs. Bicknell*, 6 Ves. Jr. 174, on page 184, treats the discovery by the defendant or his right to his answer, as one of the privileges which he enjoys in a court of equity. He says: "The defendant in this court has the protection arising from his own conscience in a degree which the law does not effect to give him protection. If he positively, plainly and precisely denies the assertion, and one witness only proves it positively, clearly and precisely, as it is denied, and there is no circumstance attaching credit to the assertion overbalancing the credit due to the denial as a positive denial, a court of equity will not act upon the testimony of the witness. *Not so at law*. There the defendant is not heard. One witness proves the case; and however strongly the defendant may be inclined to deny it upon oath, there must be a recovery against him."

The learned chancellor evidently intends here to contrast the privileges of a defendant in a court of equity and a court of law. And neither here nor elsewhere, either in the Text Books or Books of Reports, do we hear anything of the doctrine now claimed; namely, the privilege of the

complainant to deprive the defendant of the advantage thus secured to him by dispensing with his answer. True, Mr. Cooper in his treatise on equity pleading, and Judge Story, in his work on the same subject, treat of the right of the complainant to waive the *oath* to the answer itself; and they discuss rather vaguely the effect of such a waiver upon the answer as testimony; and their conclusion seems to be, if I understand them correctly, that while it must be overcome by something stronger than the oath of one witness, that still the counterbalancing proof need not be quite so strong as if the answer had been sworn to. But this is not the question before us; nor does it, in our judgment help the cause of the defendant in error in the least.

In New York, a complainant is authorized by statute, to waive an answer; and when this is done, it is treated as pleading merely.—(2 Rev. Statutes, 175 § 44.) Lord Chancellor Walworth, who, whatever may be the estimate put upon him as a jurist, presided over one of the ablest equity courts in this or any other country, said of this statute that, “it introduced a new principle into the system of equity pleading.”—*Burras vs. Looker*, 4 Paige’s Ch. Rep. 227.

For myself, I am the advocate of the change. It is unreasonable and oppressive in the extreme, that a complainant who seeks no discovery from his adversary, and is forced to go into equity for no other reason but because the relief which he prays is inadequate at law, should be compelled to make a witness of the defendant, and then can get no decree against his answer, unless he can overcome it by two witnesses, or one witness and corroborating circumstances. When without this burden, one witness would be sufficient to prove his case.

Let the legislature then follow the lead of New York, and enact that whenever the answer of the defendant is waived it shall count as pleading only. And more than

this, I beg and entreat the General Assembly to say in a few lines, that the jury *at law* may mould their verdict as in equity, to meet the exigencies of the case.

Having ascertained what the rule is in England, is there anything in our legislation which repeals it, either directly or by necessary implication? We know of nothing. On the contrary, the inferences are all the other way. It is admitted that until within a few years past the practice has been in accordance with the English rule. And that even now, the innovation is limited to a few circuits. No power, short of the Legislature, should inaugurate a change like this.

As early as 1792, in defining the powers of the superior courts, it was declared, that they should have authority to hear and determine by a jury of twelve men, all pleas, civil and criminal, and all causes of what nature or kind soever, according to the usages and custom of courts of law and equity.—Watkins' Digest, 481. What the usages and custom of the chancery courts of England have been, we have already seen. And the same idea is distinctly kept up from that day to this, viz, that whenever parties sue at law, they accommodate their proceedings to the usages and custom of the common law courts. When they sue by bill they adopt the forms of a court of equity.

Passing over the long space which intervenes, we propose to examine briefly, some of the provisions in the act of 1857, (Pamphlet, p. 106,) to alter and amend the practice in courts of equity in this State; a statute that has been overlooked in this discussion. The third section dispenses with the filing of a replication. The fourth provides that at the first term of the court, the defendant *may* plead, answer or demur. The fifth enacts, that defendant, if in his judgment he has an equitable defense, shall not be forced or obliged to file a cross-bill, but may set up such equitable defense in his answer, and pray for and obtain such relief as he may be entitled to upon the

principles of justice in as full and ample a manner as he would now be entitled to under the cross-bill. And may, if he desires it in writing in his answer, compel an answer from plaintiff at such time and upon such terms as the court may order and direct.

Thus it will be seen, that in addition to the protection afforded to the defendant by his answer as testimony, the further important privilege is extended to him of converting his answer into a cross-bill. Can the complainant, by waiving his answer, deprive him of this right? Could he take from him the benefit of his answer as evidence to entitle him to move to dissolve an injunction? And what power has the court to limit or restrict the defendant's right by prescribing a rule upon the subject? The sixth section of this act entitles either party to examine the other by commission or on the stand, notwithstanding the answer of the defendant may be filed. Knowing how often the truth is evaded by an order skillfully drawn, the Legislature have afforded this method for sifting the conscience of the defendant; still, it has not seen fit to grant to the complainant the power to deprive him altogether of the privilege of answering upon oath.

By the seventh section, the right is guaranteed to plaintiffs to amend at any time; and the co-relative right to defendants to answer such amendment within a reasonable time.

By the eighth section, which is the last I shall notice, it is declared that defendants shall only be required when an amendment is made, to answer such amendment; and if the amendment is mere formal, *the answer may be waived* and the cause proceed. This is the first and only place in our law, where this expression occurs. And it confers upon the plaintiff the right to waive an answer to a formal amendment merely. Before this relaxation, the privilege of answering was unrestricted even in cases of formal amendments. Now it may be waived in all such amend-

ments, but none others. And the right to answer all substantial allegations, whether in original or amended bills, remains as it has existed heretofore.

I think the conclusion is irresistible that all of our legislation, respecting equity causes, is based upon the assumption, that it is the privilege of defendants to answer all causes in equity, whether the bill be for discovery only, or for relief only, or for both. And to use their answer when filed, not only as evidence, but as a cross-bill, or for any other purpose authorized and sanctioned by the usages and custom of courts of chancery.

Judgment reversed.

LOCKETT *vs.* USRY.

1. The act of 1827, to amend the rent laws of this State, requires the tenant before he can arrest the proceeding thereon given to the landlord, to swear that his lease is not expired, and that he does not hold the premises either by lease or rent from the affiant who is seeking to dispossess him. *Held*, That where there is a *blank* in the affidavit where the name of the movant should appear, the omission is fatal, and is not amendable.
2. Notwithstanding the lease expired at the end of the year 1853, still, if the tenant seeks to arrest the process after the act of 1854 went into operation, his affidavit must conform to that act; the movant having amended his proceeding so as to bring himself within its provisions.
3. There is no constitutional impediment to prevent the Legislature from changing remedies, provided they are not so impaired as to rendered them nugatory. Beyond this restriction, parties have no vested rights in remedies.
4. A verdict rendered in a case, where there is no issue under the rent acts of 1827 and 1854, is a nullity, and may be treated as such.
5. Although the judgment of the court purports to be founded upon a

Lockett vs. Usry.

verdict, and the verdict is void, still the judgment can be executed, provided it be good without the verdict.

6. A tenant who holds over, may file his affidavit at any time before he is dispossessed, and arrest the proceeding.

Proceedings against tenant holding over, in Warren superior court. Tried before Judge THOMAS, April Term, 1859.

This was a proceeding under the act of 1827, by Francis M. Usry, and Isaiah G. Usry, against Cullen R. Lockett, to recover possession of premises rented to Lockett, and which he refused to deliver up at the expiration of the lease.

At the trial on the appeal, plaintiffs moved to dismiss defendant's affidavit, on two grounds; first, because said affidavit did not state that defendant did not hold the premises by lease or rent from plaintiffs; second, because defendant did not state in his affidavit that he did not hold said premises by lease or rent from any person holding under *them*. The affidavit was as follows:

Georgia, } Before me, Alfred Roney, a justice
Warren county. } of the peace in and for said county,
personally came Cullen R. Lockett, who, after being duly
sworn, saith he is not the tenant of the said Francis Usry
and Isaiah G. Usry, and does not hold the premises either
by lease or rent from —, nor any other person holding
under *him* by lease or rent.

CULLEN R. LOCKETT, [L. S.]

Signed, sworn and subscribed before me, this 5th day
of January, 1854.

ALFRED RONEY, J. P.

The court granted the motion dismissing defendant's affidavit, and defendant excepted.

Defendant then moved to amend the affidavit by inserting the word *them* in the blank after the word from, and

by changing the word *him* to *them*, after the word *under*, in the last line of the affidavit. The court refused to allow the amendment, and defendant excepted.

Plaintiffs moved to amend by making a new affidavit in compliance with the terms and provisions of the act of 18th February, 1854. The court granted the motion, and defendant excepted.

Defendant then offered, by way of amendment, a new affidavit, as follows:

Francis M. Usry and Isaiah G. Usry, vs.	} In Warren superior court. On appeal—motion to dispossess ten- ant.
Cullen R. Lockett.	

Leave to amend having been granted by the court, the defendant, Cullen R. Lockett, for amendment to his pleadings, personally appears in open court, and being sworn, says on oath, that he is not the tenant of Francis M. Usry and Isaiah G. Usry, or either of them; and that he does not hold the premises by lease or rent from the said Francis M. Usry and Isaiah G. Usry, who made the within oath in said case, or by any one holding under them or either of them by rent or lease.

CULLEN R. LOCKETT.

Sworn to in open court, April 9th, 1859.

THOMAS W THOMAS, J. S. C., N. C.

The plaintiffs objected to this affidavit as an amendment, the same not conforming to the act of 18th Feb., 1854. The court sustained the objection, and disallowed the proposed affidavit as an amendment, and counsel for defendant excepted.

The court then remarked to counsel for the plaintiffs that they could take a verdict if they desired to do so, and defendant excepted.

Counsel for the plaintiffs then drew up a form of a verdict and handed it to the jury. The court charged them that the only evidence before them, was the affida-

vits of the plaintiffs, and they must find for them if they believed the affidavits, and they must believe the affidavits, unless they were impeached, and there was something to show that they were not true. To which charge defendant excepted.

The jury retired, and found and returned the verdict which had been prepared and drawn up by counsel for plaintiffs, before which counsel for plaintiffs moved "that the verdict in this case having been rendered for the plaintiffs, it is ordered that the sheriff or his deputy be required to put the plaintiffs into possession, forthwith of the premises described in the plaintiffs' complaint. It is further ordered that the clerk do issue to the sheriff a writ of possession."

Defendant objected to this order. The court overruled the objection and granted the order, and defendant excepted.

Whereupon counsel for defendant tender their bill of exceptions, assigning as error the rulings, decisions, and charges above excepted to.

WARDEN & NELMS, and GIBSON & HUFF, for plaintiffs in error.

E. H. POTTLE, and T. R. R. COBB, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

Was the affidavit of Lockett sufficient?

When a landlord seeks to dispossess a tenant who holds over, under the act of 1827, (Cobb, 901,) the tenant to arrest the proceeding, must make oath that he does not hold the premises, either by lease or rent from the said person or from any one holding under him, by lease or rent. There is a *blank* in this affidavit where the name of the *two* Usrys should be inserted; and the singular pro-

noun him, is used instead of the plural pronoun them, provided it was the intention of the deponent so to fill up the affidavit.

It is argued that these omissions and mistakes were mere oversights, and that the affidavit is good as it stands. Let us test this. Suppose Lockett was indicted for false-swearing; and the assignment was, that he made oath that he did not hold the premises in dispute by rent or lease from the Usrys, and the attorney for the State was to offer in evidence this affidavit to support the averment in the indictment. Would the jury find—could anybody say that Lockett intended so to swear? Perhaps he refused designedly so to state. We may speculate and conjecture; but in a matter like this there must be certainty. The cases cited from the decisions of this court do not sustain the plaintiff in error. In *Pherisfield vs. Carter*, (2 Kelly, 143,) it was held that the omission of the word “grant,” in one section of a *statute*, may be explained by other parts of the same statute, so as to supply the omitted word and give the act its intended effect. In 19 Geo. Rep. 33, this court held, that an appeal affidavit *in forma pauperis*, was amendable. We will not cumber our reports by repeating the reasoning of the court to sustain these decisions. We do not intend to overrule or modify them. The proposition to amend, or rather to supply this affidavit with that which the party himself has not seen fit to put in, it stands, as we conceive, upon a totally different principle. It is neither more nor less than an offer to make an affidavit for the tenant, which *possibly*, he was unwilling to make for himself. We do not say it is so. The fact may be otherwise; still, it does not weaken the force of the reasoning.

The court refused to permit the tenant to perfect his affidavit in terms of the act of 1827, under which this proceeding was instituted. And we think the court right in so ruling.

Plaintiffs then asked leave to amend their affidavit, so as to make it conform to the act of 1854, (Pamphlet, p. 55,) and they were allowed so to do. As their proceeding was commenced under the act of 1827 and before the act of 1854 went into operation, this may not have been necessary on their part; still, as it imposed an additional burden upon them, it constituted no good cause of exception in favor of Lockett. Be this as it may, he still refused to make oath in any other form than that required by the act of 1827. In other words, he would not swear, in addition to the oath required by the act of 1827, that he did not hold under the *vendor* of the affiants.

The tenant adhering to this position, counsel for movants were permitted by leave of the court to take a verdict upon which judgment of ouster was awarded.

The position occupied in this court upon this branch of the case is this: That the act of 1854 was *ex post facto* as to Lockett, or took away from him a vested right which he had—to file his affidavit under the law of 1827.

We do not deem this ground maintainable. Really this ceased to be a contest on both sides under the *old* law and was superseded by one under the *new*. And suppose this adverse possession commenced at the expiration of the year 1853, did it not continue down to the time when these parties were litigating before the court? And although the right to dispossess accrued *eo instanti* the lease terminated, still was it not renewed every subsequent day thereafter? And was not the owner entitled to all the rights and remedies which the law supplied, whenever he saw fit to move in the matter?

If the legislature see fit to alter the law as to the manner of pleading either at law or in equity, or in any summary or anomalous proceeding, and the statute takes effect before the defence is made, the party must conform to the new rule. And he cannot complain of having been deprived of a vested right. There is, we apprehend,

no such thing as a vested right in remedies. All the courts say is, that the legislature cannot so change the remedy as to render it nugatory. And that, perhaps, is the trouble in this case. By requiring the tenant to swear that he does not hold under the *vendor* of the *affiants*, he cannot take the oath. If so he should surrender the premises without further contestation.

In conclusion, we would add, that the court was wrong in authorizing a verdict to be taken. The oath of the tenant being ruled out, there was no issue in court. Still, the judgment of ouster was right—the execution of which may be stopped by the tenant at any time, upon condition that he will make oath under the act of 1854; not otherwise.

STOWERS vs. CARTER.

An agent or attorney-at-law seeking to take out an attachment must swear *positively* to the *ground* of attachment. As to the amount of indebtedness, he may depose to the best of his knowledge and belief.

Attachment, in Hart Superior Court. Decision by Judge THOMAS, at January adjourned Term, 1859.

Francis G. Stowers sued out an attachment against James M. Carter, returnable to Hart Superior Court. At the trial term, defendant moved to dismiss the attachment, because in the affidavit, which was made by the attorney of plaintiff, the ground of attachment was sworn to “according to the best of the knowledge and belief” of the deponent.

The following is a copy of the affidavit:

State of Georgia, } Francis G. Stowers, by his attorney,
 County of Hart. } Henry Cleveland, comes before
 me and says, on oath, that James M. Carter, of said county,
 is indebted to him the sum of twenty-eight hundred dollars,
 and that James M. Carter is causing his property to be removed
 without the limits of this State, according to the best of my
 knowledge and belief.

H. CLEVELAND, for
 F. G. STOWERS.

Sworn to and subscribed before
 me, October 6th, 1857.

J. V. RICHARDSON, J. I. C.

Interlined before signing.

The court sustained the motion and dismissed the attachment, which decision is assigned as error.

HESTER & AKERMAN, for plaintiff in error.

DELONY, for defendant in error.

By the Court.—LUMPKIN, J., delivering the opinion.

Was the affidavit in this case sufficient to sustain the attachment?

The act of 1856 (Pamphlet, p. 25,) provides that process of attachment may issue when the debtor is causing his property to be removed beyond the limits of the State, if the party seeking the attachment, his agent or attorney-at-law shall make oath before a proper officer that the debtor has placed himself in the above position; and also swear to the amount of the debt claimed to be due. The statute further declares, that when the affidavit is made by the attorney-at-law or agent of the party, *he* may swear that the amount claimed to be due is due according to the best of his knowledge and belief.

Several conclusions are to be drawn from the terms of this law. First, that prior to its passage a positive oath was required of the *party*, both as to the amount of in-

debtedness and the ground of attachment; secondly, that the relaxation is made only in behalf of agents and attorneys who depose; and thirdly, that the relaxation extends only to the indebtedness and not to the ground of attachment. This being so, and we see no way to escape these conclusions, it follows, of course, that the court was right in dismissing the attachment.

Judgment affirmed.

JOHNSON vs. REESE.

The effect of the Sheriff's failure to advertise his sale, at three or more of the most public places in the county, is not to render the sale void, but the Sheriff liable for any loss that may, by reason of such failure, happen to any one interested.

In equity, in Glasscock Superior Court. Decision by Judge THOMAS, at Chambers, November 8, 1858.

This was a bill for relief and injunction, filed by Asa Johnson, against Agustus C. Reese, Sheriff of Glasscock county, and others. The object of the bill was to set aside a sale of complainant's land, made by Reese, as Sheriff, under certain *fi. fas.* The bill states that by virtue of sundry executions issued from a Justice Court, against complainant, the land belonging to him, consisting of one hundred and eighty acres, was levied upon by a constable, who returned said levy to the sheriff of Glasscock county; that said sheriff advertised said land in the *Constitutionalist*, a newspaper published in the city of Augusta, to be sold on the first Tuesday in July, 1858; that there was a crop of cotton and corn growing on the

place at the time, worth about four hundred dollars, and which was not excepted in the levy, or at the sale.

The bill further states that said land was sold on the first Tuesday in July, 1858, without being advertised as required by law; in this, that it was not advertised at three public places in said county, or at any place, public or private, but the only advertisement of sale was that contained in the Constitutionalist, as above mentioned.

The bill further states, that on the day of sale complainant protested against this sale, for the reason that the same had not been legally advertised: that notwithstanding said protest, the sheriff proceeded with said sale, and sold the land to one Edwin A. Brinkley, for the sum of four hundred dollars, he being, at that price, the highest and best bidder for the same; but said land was worth more than twice that amount, besides the crop growing thereon; that Brinkley shortly afterwards sold said land to Elcary Todd, for seven hundred dollars.

The bill prays that the sale made by the sheriff be set aside; that the deeds from the sheriff to Brinkley, and from Brinkley to Todd, be cancelled, and declared null and void; and that the sheriff be restrained from putting the said purchaser or his assigns into possession of said land, &c.

Upon the coming in of the answer, defendant moved to dissolve the injunction which had been granted in the cause, on the grounds—

1st, That the act of 1799, which declares that the sheriff shall advertise sales of land in one of the Gazettes of the State, and in three of the most public places in the county, is repealed by the act of 1850.

2d. That there was no equity in the bill.

3d. That the bill had been fully sworn off by the answer.

4th. That complainant has an adequate remedy at law. After argument, the Chancellor granted the motion

dissolving the injunction. To which decision counsel for complainant excepted.

E. H. POTTLE, for plaintiff in error.

WARDEN & NELMS and A. H. STEPHENS, *contra*.

By the Court.—BENNING, J., delivering the opinion.

Was the Court below right in sustaining the motion to dissolve the injunction? One of the grounds of the motion was, that there was no equity in the bill. If that ground was good, the answer must of course be in the affirmative.

Is it true, then, that there was no equity in the bill?

Both the first and the second purchaser bought with notice of the sheriff's omission to advertise the sale of the land "in three of the most public places in the county;" but there was no collusion between twem, or either of them, and the sheriff. The question, therefore, is, did this omission in the sheriff, and their notice of the omission, render the sheriff's sale void?

If, notwithstanding the omission, the sheriff had, still, *authority* to sell, the sale was not void, but was valid? Did the sheriff, then, have authority to sell? It is conceded that he had, unless the 33d section of the Judiciary act of 1799 deprived him of the authority. That section is as follows: "No sales in future shall be made by the sheriff, of property taken under execution, but on the first Tuesday in each month, and between the hours of ten and three in the day; and it shall be the duty of the sheriff to give thirty day's notice in one of the public gazettes of the State, of all sales of lands and other property executed by him, and also advertise the same in three of the most public places in the county where such sales are to be made, and shall give a full and complete description of the property to be sold, making known the name of the

defendant, and the person who may be in possession of the property, except horses, hogs and cattle, which may be sold at any time, by the consent of the defendant; and in which case it shall be his duty to give the plaintiff ten days notice thereof, and also to advertise the same in three or more of the most public places in the county where such property may be, at least ten days before the sale." Cobb 509. This section says, then, that it shall be "*the duty*" of the sheriff to advertise his sales, in three of the most public places in the county? But is that saying that if he fails so to advertise, his *authority* to sell shall cease, and, any sale made by him shall be void? We think not. The first part of the section says, "No sales" "shall be made" "but on the first Tuesday in each month, and between the hours of ten and three." This is stronger. This amounts to saying that the sheriff shall not have *authority* to sell at any other time. After this, when it comes to speaking of the advertisement, the form of expression changes, and becomes weaker. It shall be *the duty* of the sheriff to advertise his sales, &c., not *that* no sale shall be made unless he does so advertise them. Such is the form the expression then assumes.

Some effect ought, we think, to be given to this charge, in the form of the expression. And the least effect to be given to it seems to be to say that the intention was that the sale should be valid, notwithstanding the omission to advertise it, but that the sheriff should be liable to make good any loss happening to any one interested, occasioned by the omission to advertise. And giving this effect to it, would be doing what would be best for both the plaintiff and the defendant in the *fi fa.*; for it would operate to encourage persons to become bidders for the property, and to encourage bidders to run the property to its value.

We think, then, that the only effect of the sheriff's omission to advertise this land, in three of the most pub-

Heard vs. Brawner.

to places of the county, was to render himself liable to whomsoever the omission injured, to make good the injury. We think that the effect did not go further, and render the sale void.

Consequently, we think that there was no equity in the bill, and, therefore, that the judgment dissolving the injunction was right. Taking this view of the case, it becomes unnecessary to notice several other questions which were argued.

If there had been a fraudulent collusion between the purchaser and the sheriff, the case might have been different.

Judgment affirmed.

HEARD vs. BRAWNER.

The decision pronounced in the case of Burch, ex'r., vs. Burch *et al*, 23d Geo. Reports, 536, reviewed and reaffirmed, viz: that under the terms and provisions of the will of W. C. B., (*vide* Reporter's statement below,) only the children of Elizabeth Upshaw, living, *at the death of the tenant for life*, were entitled to the legacy bequeathed to to the "*children of Elizabeth Upshaw.*"

BENNING, J., dissenting.

In equity, in Elbert Superior Court. Tried before Judge THOMAS, March Term, 1859.

This was a bill of interpleader, filed by John C. Burch, executor of Elizabeth Burch, deceased, against Thomas J. Heard, administrator of Middleton C. Upshaw, deceased, Jephtha Harris and wife, John Upshaw, Joseph Brawner and wife, Seaborn J. Brawner and wife, Thomas B.

Clark and wife, and Charles Hardeman. The object of the bill was to have the aid and direction of the Court in the execution of certain clauses of the last will and testament of William S. Burch, deceased.

For a copy of the will, see 23d Geo. Rep'ts, 536.

The bill alleges that William S. Burch, the testator, died in January, 1822, leaving a considerable estate; that said will was duly admitted to probate at the January term, 1822, of the Court of Ordinary of Elbert county; that Elizabeth Burch, the widow of testator, and executrix of said will, departed this life on the first day of July, 1855, leaving in full force her last will and testament, of which complainant was appointed executor, who accepted said trust, and thereby became the executor of the will of William S. Burch, deceased; that complainant has executed the will of said William S. Burch, as far as practicable, but he has been delayed by litigation growing out of the construction of said will; that on the first of February, 1858, there was in complainant's hands, for distribution, the sum of \$68,077.05, one-tenth of which amount, to-wit, the sum of \$5,673.08 $\frac{1}{2}$, belongs to the children of *Rebecca Upshaw*, under the terms and provisions of said will.

The will was executed on the 15th day of May, 1817. Testator died in January, 1822. At the date of the will, and at the death of testator, *Rebecca Upshaw* had two children, *Middleton C. Upshaw* and *Elizabeth Upshaw*. She has had no other children since, and from her extreme age, it is not possible, in the ordinary course of nature, that she should have any more.

Middleton C. Upshaw died in the year 1837, intestate, leaving as his distributees and heirs at law, his widow, *Elizabeth*, now the wife of *Robert L. Harris*, to whom she was married in 1840, and his children, *Martha*, now the wife of *Jeptha Harris*, and *John Upshaw*. Administration upon the estate of *Middleton C. Upshaw* was

granted to Thomas J. Heard, one of the defendants in the bill, and who claims one-half of the legacy to the children of Rebecca Upshaw, as belonging to his intestate, and subject to distribution among his heirs at law. The said Jephtha Harris and wife, and John Upshaw, claim the whole legacy due and coming to their father, the said Middleton, under said will, and insist that their mother, the said Elizabeth, is entitled to no part thereof, and that Heard, as administrator of the father, has no right to receive the same.

Elizabeth Upshaw, the other child of Rebecca Upshaw, was first married to Joel Hardeman, who died in 1831, by whom she had three children, Ann, now the wife of Seaborn J. Brawner, Elizabeth, now the wife of Thomas B. Clarke, and Charles Hardeman, of the State of Texas. In the year 1837 Elizabeth, then Mrs. Hardeman, intermarried with Joseph Brawner, her present husband, by whom she has two children.

Under the facts thus stated, complainant submits to the Court the question as to whom the legacy in his hands belonging to the children of Rebecca Upshaw, shall be paid.

After argument, the presiding Judge decided that Joseph Brawner, in right of his wife, Elizabeth, formerly Elizabeth Upshaw, and the only child of Rebecca Upshaw living at the death of the tenant for life, was entitled to the whole legacy in the hands of complainant, bequeathed to the children of Rebecca Upshaw, to the exclusion of the representatives and children of Middleton C. Upshaw, and to the exclusion of all the children of his wife, the said Elizabeth; and he directed that a verdict and decree be taken accordingly.

To this decision counsel for defendants excepted.

T. R. R. COBB and WM. T. VAN DEZER for John Upshaw and Harris and wife.

HESTER & AKERMAN for Heard, adm'r of Middleton C. Upshaw, dec'd.

ROBERT TOOMBS, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

The only question in the case really is, whether the children of Rebecca Upshaw, the sister of testator's wife, took a vested or contingent remainder in the legacy left to them by William S. Burch? It has been twice decided that by this Court, after solemn argument, and under those adjudications, the whole estate has been sold, and about \$100,000 of it distributed according to the directions of the will; that the legacy bequeathed to the children of Rebecca Upshaw was contingent upon the event of their being alive at the marriage of Elizabeth Burch, or at her death, should the widow never marry. (19 Geo. Rep., 174; 23, *ib.* 536.)

In the first of these cases, the point was incidentally made and considered; and the judgment is sustainable on other grounds, still this Court ask, "Were the remainders vested at the death of William S. Burch?" For, if any one of the several beneficiaries took a contingent remainder, then the law, which will not allow the estate ever to be in abeyance, must keep the title in the estate of William S. Burch, until the contingency happens. We think it clear that those provisions in the will of William S. Burch, referring to the death of his wife, sisters, and also to the death of the heirs of William T. Cook, leaving no child or children, look to those contingencies as arising during the lifetime of his wife. "Upon a careful review of this will, it is evident that the testator did not intend the title to his property to pass out of his estate during the lifetime of his wife, except in the event of her marriage." "His testamentary idea clearly was, that his wife should have the *usufruct* of his estate only, the title remaining in his executors, &c.

In the case in 23d Georgia Reports, the question under discussion was broadly made, and upon thorough argument directly decided by this Court. True, it was upon another branch of the will, the contest being between the descendants of a brother of the testator instead of the family of his wife's sister; and much ingenuity has been exhibited by the counsel for the plaintiffs in error, in attempting to discriminate between the two classes of testamentary disposition. We are unable to see any difference. And if there be a distinction, it is against the present claimants. To avoid repetition, I refer to the able exposition of the true intent and meaning of Wm. S. Burch's will, by my late highly esteemed colleague, Gov. McDonald, whose retirement from the Bench imperiously demanded by the state of his health, I feel, in common with the whole community, to be a public loss, yea, more than others, as I had a better opportunity for knowing and appreciating his worth. By that opinion, in which I concurred, it is settled, that Mrs. Brawner, being the only child of Rebecca Upshaw living at the death of Mrs. Elizabeth Burch, she was entitled to the whole of that portion of the testator's property, left contingently to the children of the said Rebecca.

It only remains, therefore, to affirm, as we do, the judgment of the Court below.

Judgment affirmed.

STEPHENS, J.. concurred.

BENNING, J., dissenting.

I think that the children of Rebecca Upshaw took *vested* remainders, viz: vested remainders subject to be divested on her dying, leaving no child or children. This opinion I have already twice expressed, the case having been, heretofore, several times before the Court. See 19 Geo., 187; 23 Geo., 567. She died leaving a child. Therefore, if I am right in my opinion, the remainders to

 Deboard vs. Brooks and Amis.

her children were never divested, and if the remainders were never divested, the remainder of any child went, on his death, not to the surviving children, but to his representatives. This Court thinks that the whole share to her children went to the one of them who survived the life tenant. From this I dissent. I think it went to that child, and to the representatives of her two dead children.

DEBOARD vs. BROOKS AND AMIS.

1. When in describing the case in which bail is taken, everything is recited in the bond but the name of the county where the action is pending; and the bond purports to be executed in that county, a *prima facie* case of identity is made out to carry the case to the jury.
2. Where a judgment was rendered on the 28th October, 1857, and the *capias* was issued thereon on the 2d day of November thereafter; and the clerk testified that he commenced immediately after court to make out his execution docket, and issued this process in its order. *Held*, That there was no such negligence on the part of the plaintiff, or the clerk as would discharge the bail.

Scire Facias, against Bail, in Oglethorpe superior court.
Tried before Judge THOMAS, April Term, 1859.

This was a scire facias sued out by J. J. Deboard against William F. Brooks, principal, and Thomas Amis, jr., security, on a bail bond, of which the following is a copy:

Georgia, } Know all men by these presents,
Oglethorpe county, } that we, William T. Brooks and
Thomas Amis, Jr., are held and firmly bound unto J. J.
Deboard, his heirs, executors and administrators, in the
sum of five hundred and thirty-nine dollars and seventy
cents, for which payment well and truly to be made and

done we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this 4th April, 1857. The condition of the above bond is such, that whereas a civil process requiring bail at the suit of J. J. Deboard, against the said William T. Brooks, in an action of complaint, &c., returnable to the superior court to be held on the third Monday in April next, hath been served on said William T. Brooks. Now if the said William T., in case he be cast in said suit, shall well and truly pay and satisfy the condemnation of the court, or render his body to prison in execution of the same in terms of the law in such cases made and provided, and upon failure thereof the said Thomas Amis, jr., will do it for him, then the above obligation to be void else to remain in full force.

(Signed.)

WM. T. BROOKS. [L. S.]

THOMAS AMIS, JR. [L. S.]

Defendant objected to the admission, in evidence, of said bond, on the ground that it did not designate the county to which the action was returnable. The court overruled the objection and admitted the bond in evidence. To which decision counsel for defendant excepted.

Plaintiff next offered in evidence the *capias ad satisfaciendum*, which had been issued on the judgment rendered in the suit of Deboard against Brooks. Defendant objected to its introduction, upon the ground that it appeared that the judgment was rendered on the 28th October, 1857, and the *capias* did not issue till the 2d November, 1857. The court overruled the objection and admitted the *ca sa*.

The plaintiff further proved by the clerk that he issued the *capias ad satisfaciendum* in its regular order. That after a court adjourns he immediately begins to make out an execution docket, and commences at once to issue executions on judgments rendered at said term, issuing them in their regular order. That he might have issued

the ca. sa. in this case earlier, if application had been made, but none being made he waited until he reached it in its order.

The presiding judge charged the jury that the bail was not liable—the *capias ad satisfaciendum* not having issued until 2d November, the judgment having been rendered 28th October previously.

Under this charge the jury found for the defendant Amis. Whereupon counsel for plaintiff excepted, and assigned as error the charge aforesaid.

T. R. R. COBB, B. F. HARDEMAN, and S. W. HARRIS,
for plaintiff in error.

ROBT. TOOMBS, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

Both parties complain in this case; and by consent, the errors alleged by each have been heard.

Was the court right in overruling the exceptions which were taken to the bail bond—namely, that it did not recite the term of the court to which the action was returnable in which it was taken? The description is, “a civil process requiring bail at the instance of J. J. Deboard against the said William T. Brooks, in an action of complaint, &c., returnable to the superior court to be held on the third Monday in April next, and which has been served on the said William T. Brooks.” We find in the record and in point of fact, an action in the superior court of *Oglethorpe* county, where this bond, from its caption, appears to have been taken, answering precisely to the recitals in the bond, and none is shown to be pending between those parties anywhere else. Is not the question of identity *prima facie*, at least satisfactorily made out? To my mind, such an objection is both technical and frivolous at this day. Does any one doubt that Thos.

Amis knew *where* and when he was bound to see to it—Brooks, his principal, paid this debt or rendered his body to prison in execution of the same? Why does he pretend ignorance then of his obligation in this respect? The period for such trifling is past.

2. The judgment was rendered in this case 28th of October, 1857, and the *capias* did not issue till the 2d November, 1857; and the presiding judge charged the jury, that by reason of this delay, the bail was discharged. We do not think so.

The clerk's testimony proves, that there was no unreasonable delay in issuing this process; and it is a mere question of diligence. The bail did not call for the *ca. sa.* within the five days. It was issued by the clerk in its order, in making out the execution docket. It was entitled by law to no special preference.

The decision of this case is attempted to be sustained by the ruling of this court in *Lichten & Baker vs. Mott*, (10 Ga. Rep. 138,) where it was held that for the purpose of fixing the liability of the bail, the *ca. sa.* against the principal, should be retained in the hands of the sheriff, until the next term of the court, to which it was by law returnable. It is said that the court there maintained that the process must remain in the hands of the officer the *whole* time between the judgment and the return term. We did say, that during the time that intervenes between the *test* and *return* of the *ca. sa.*, it must remain in the officer's hand, to be executed if practicable. There is no pretence that that was not done here. The *test* of the *capias* was the 2d November, and not the 28th October, 1857; and we repeat the only question in *this case* is, did the *ca. sa.* issue within a reasonable time. The case in 10th Georgia, does not raise or decide the point made here.

Judgment reversed.

SELMAN vs. MILLIKEN.

An administrator is not subject to garnishment within twelve months after his appointment.

Garnishment, in Walton Superior Court. Decision by Judge HUTCHINS, at February Term, 1859.

William Milliken, plaintiff in *fi. fa.*, sued out garnishment against George C. Selman, as administrator of Josiah S. Selman, deceased, requiring him to answer what money, effects, &c., he, as such administrator, had in hand belonging to James J. Selman, who was defendant in *fi. fa.*, and heir-at-law of the administrator's intestate. The garnishment was sued out within twelve months after the appointment of the administrator. Upon this agreed state of facts, counsel for the garnishee moved to dismiss the garnishment. The court refused the motion and counsel for garnishee excepted.

CHARLES D. DAVIS, for plaintiff in error.

HULL & HILLYER, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

This is a garnishment to reach the interest of an heir-at-law. That interest is only a distributive share of what may remain after all debts are paid. By our law the administrator is allowed twelve months within which to ascertain the debts before paying them or paying any distributive share. He can not know what a distributive share will be until he first knows the debts, and these he cannot ascertain in a manner to protect himself, without waiting for the expiration of the twelve months. This

garnishment, therefore, requiring him, before the expiration of the twelve months, to answer what he owes, or what effects he has, requires him to answer what he can not know. An injunction could require him to *pause* and answer when the proper time comes, but a garnishment calls for an answer *now*. The heir-at-law cannot maintain an action for his distributive share within the twelve months, and his creditor who seeks to take his shoes, can do no better. We think, therefore, that garnishment is not a legal remedy against an administrator within twelve months after his appointment, whatever it may be afterwards. Let the judgment be reversed.

COUCH vs. THE STATE.

To complete the offence of uttering a forged paper, it must be published *as true*, when the party knows it to be fraudulent; and with intent to injure somebody. And if the jury fail to find this, their verdict is a nullity, upon which no judgment can be awarded but one of acquittal.

Indictment for Forgery, in Gwinnett Superior Court. Tried before Judge HUTCHINS, at March Term, 1859.

Chaney Couch, the plaintiff in error, was indicted and tried for forgery. The jury found the following verdict: "We, the jury, find the defendant guilty of publishing and passing the receipt in question, knowing it to be a forgery—but we recommend him to mercy."

Whereupon, counsel for the prisoner moved in arrest of judgment upon the following grounds:

1st. Because the verdict does not find the defendant

guilty of any crime or offence for which judgment or sentence can be pronounced against him.

2nd. Because the verdict is a *special* and not a general verdict, and therefore illegal, and no judgment can be pronounced thereon.

The court overruled the motion, and defendant excepted.

HULL & HILLYER, and OVERBY, by T. R. R. COBB, for plaintiff.

S. P. THURMOND, Sol. Gen., for the State.

By the Court.—LUMPKIN, J., delivering the opinion.

Did the jury in this case find the defendant guilty of any offence; and could judgment have been awarded by the court? The defendant was indicted for passing a forged receipt; and the jury found him guilty of passing the receipt, knowing it to be forged. But to complete the offence the Code requires not only that the accused should pass the receipt, knowing it to be forged, but, also, that he must pass it "*as true*;" and "with intent to defraud" somebody. And is not this reasonable and right? If the defendant passes the paper as a forged instrument, and with no intent to injure any one, whether seriously or in jest, should he be convicted of a crime and imprisoned in the Penitentiary from four to ten years?

Had the jury found the prisoner guilty generally, or guilty of forgery, the verdict would have been good, and the court would have punished him for the highest offence charged in either of the four counts in the indictment. Or if their verdict had made reference to or been connected with the indictment or any of the counts thereof, it might have stood. As it is, it is a nullity, and no judgment can be awarded upon it. It may be that they did not believe that he passed this receipt as true, or if they

did so believe that it was not the intention of the accused to injure anybody. They do recommend him to mercy.

The fault in the case, if there be any, was in not refusing to receive this verdict when it was brought into court; and compelling the jury either to convict or acquit the defendant of the charges in the indictment. Whether intended or not, their finding, by falling short of a conviction of any offence, amounting to an acquittal.

Judgment reversed.

HARDY vs. PARK.

A testator set apart 80 shares of Railroad stock, "for the purpose of educating" his three minor children, who were very young; and, he directed, that they should "be boarded and educated out of the same," until they received a thorough classical education.

Held, That the cost of the children's *clothes*, during the period of their education, was a charge on the stock.

In Equity, in Jackson Superior Court. Decision at Chambers, by Judge HUTCHINS.

This was a bill filed by the executors of the last will and testament of William Parker, deceased, for direction as to the execution of said will, &c. The principal questions made by the bill were disposed of when the case was first before this court.—19 Geo. Rep., 127.

The only question made by the present bill of exceptions, is, whether the bequest, in the 4th item of said will, of Georgia Rail Road stock, for the *boardiag* and *education* of the children under age, extends to *clothing*. The following is the clause of the will referred to:

"Item 4. I bequeath and set apart my rail road stock, being eighty shares, in the Georgia Rail Road & Banking Co. for the purpose of educating my children now under age, and direct that they be boarded and educated out of the same, until they receive a thorough classical education, if they have sufficient capacity for the same; and should my present wife have a child, it to be boarded and educated in the same manner, and share in all other respects with my children now under age."

The presiding judge held and decided that it did not extend to clothing, and counsel for the children excepted.

T. R. R. COBB, for plaintiffs in error.

W. H. HULL, *contra*.

By the Court.—BENNING, J., delivering the opinion.

Does the bequest make the *clothes* of the children a charge on the rail road stock? The court below held that it does not, but we think that it does.

A child, to be educated, has to be clothed. And it is a general principle, that a grant of the end is a grant of the means. According, then, to this principle, the bequest of an education to the children was a bequest to them of their clothes during the period of their education.

This view is favored by the large amount of the property which is charged with their education. The dividends alone on eighty shares of stock, if well managed, will, probably, the tender years of the children considered, be sufficient to give them a classical education, including the expense of board and clothing.

A child to be educated, has not only to be clothed, but also to be supported—to be *boarded*.

According, then, to the principle aforesaid, the grant of an education is the grant of board and clothes, as things inclusive in the grant of an education. And the grant in

the present case was of an education. The stock was set apart "forthe purpose of educating" the children. True, there followed immediately afterwards, the mention of *board* and education. "I" "direct that they be boarded and educated." But the mention of board, whilst it may perhaps serve to show that the testator thought board not included in education, can hardly serve to show that he also thought clothes not intended in it. And the failure to mention clothes, while mentioning board, may give color to an argument, that he omitted clothes, because he thought them included in education, and therefore thought their mention unnecessary.

We think, then, that the clothes of the children, during the period of their education, were a charge on the rail road stock.

In North Carolina a similar view on the question is entertained.—See Busby's Eq., 148; 1 Dev. & Bat. Law, 397-399; 2 do. Eq., same case; 6 Iredell's Eq., 3, 2d 23.

Judgment reversed.

TOOMBS vs. HILL.

The assets of a partnership were not sufficient to pay the debts against the partnership; the separate assets of one of the partners, a deceased person, were not sufficient to pay his separate debts.

Held, that the partnership debts had the right to be first paid of the partnership assets, and the separate debts the right to be first paid out of the separate assets.

Exception to award of arbitrators—in Wilkes Superior Court. Decided by Judge THOMAS, — Term, 1859.

The facts of this case are sufficiently stated in the following opinion pronounced by the Court.

WM. M. REESE & BARNETT, for plaintiff in error.

T. R. R. COBB, *contra*.

By the Court.—BENNING, J., delivering the opinion.

Henry J. Pope and Allen W. Hill were members of a partnership, under the name of H. J. Pope & Co. The assets of that partnership, at its close, amounted to "more than \$45,000." The debts of the partnership exceeded the amount of the assets. As many of the debts as the assets would pay were paid out of the assets by Mr. Hill; the rest of the debts he paid out of his individual property.

Mr. Pope died, and Mr. Toombs became his administrator. His separate estate, in the hands of Mr. Toombs, amounted to \$102,266 68. There were debts against Pope, individually, amounting to \$66,691 54, which were "entitled to be paid in full" out of these assets. The residue of these assets left, after paying these debts, for the payment of the other separate debts, would consequently be \$35,575 14. These other debts amounted to \$93,571 88. This residue, therefore, was not sufficient to pay them.

Hill insisted that the debts against H. J. Pope & Co., which he had taken up with his separate funds, ought to be paid to him out of the residue aforesaid of the separate funds of H. J. Pope, *pro rata*, with the said \$93,571 88 of separate debts against Pope. This claim the administrator of Pope opposed.

The claim, with some other matters, was referred to "auditors," who reported "that copartnership debts of H. J. Pope & Co., paid by Allen W. Hill," entitled "him to share *pro rata* in the individual assets of H. J. Pope." They also reported on the other matters referred to them.

The Court approved their report, and that approval was excepted to by the administrator of Pope. The exception was, in this Court, confined to the part of the report aforesaid, which gives to Hill, a creditor of H. J. Pope & Co., the right to share with the separate creditors of Pope in the separate assets of Pope. And the decision of this Court will not go beyond the argument.

The question, therefore, will be this: Did the debts against H. J. Pope & Co., held by Hill, have the right to share, *pro rata*, with the debts against H. J. Pope, held by other persons, in the separate assets of H. J. Pope, in the hands of his administrator? Let it be borne in mind, that none of the debts of either class were in judgment at the time of Pope's death, and, consequently, that what is the effect of the statutes regulating judgment liens, is not in the case.

In Story's Equity Jurisprudence, (§ 676,) the following propositions are asserted: "The creditors of the partnership have a preference to have their debts paid out of the partnership funds, before the private creditors of either of partners. But this preference is, at law, generally disregarded; in equity, it is worked out through the equity of the partners over the whole funds. On the other hand, the separate creditors of each partner are entitled to be first paid out of the separate effects of their debtor, before the partnership creditors can claim anything."

These propositions are, we think, established as generally true, by the authorities cited in their support, and by other authorities.—See 1 Amer. Lead. Cases, 319. The case in which there are no joint effects, and the case in which there is no solvent partner, are, it seems, exceptions; in them the creditors of the partnership being allowed to share in the separate effects of the partner equally with his separate creditors. In the present case, there were both joint effects and a solvent partner. Consequently, if it be true that these are excepted cases, yet

it can make no difference in this case, as this case does not fall among them.

Has the doctrine of the common law, taught by these propositions, been changed by any of our own State legislation?

The Judiciary act of 1799, and the acts amendatory of it, make all the property of a defendant in judgment "bound from the signing of the first judgment." Pr. Dig. 426 435. In *Cleghorn vs. The Insurance Bank of Columbus*, (9 Ga. 319,) this Court, in view, probably, of these acts, decided that a judgment against the partnership, older than a judgment against the partner, had over the latter a preference, even in the separate property of the partner.

A judgment against a partnership is also a judgment against each partner; and if a judgment against a man binds all of his property, it would seem to follow, of necessity, that a judgment against the partnership must bind the separate property of each partner equally with this partnership property. And so, too, it would, for the same reason, seem to follow that a separate judgment against a partner must bind his partnership property equally with his separate property. In respect to this last case, however, it must ever be kept in mind, that what is this partnership property of the partner is no more than his interest in the *surplus effects* of the partnership, that remain after all the debts of the partnership have been discharged, the partners having the legal title to all of the partnership effects, and the right to have those effects applied to the payment of the partnership debts, before a partner can touch any part of them. The effect of this is, it is true, to make the separate creditors of a partner compete, on very unequal terms, with the creditors of the partnership. But this is an evil for which it seems difficult even to devise a remedy, without destroying this right in the partners; for, if we say let the

creditors of the partnership stand back from the effects of the separate partner, until his separate creditors have taken of those effects a share equal to the share of the partnership effects taken by the partnership creditors, yet in many cases, this, our rule, will not produce the desired equalization, and, in the rest, it will do so only at a ruinous cost. In many cases—in, I think, quite a majority of of the cases—the part of a partner's property which he has in the partnership, will bear to the partnership debts a larger proportion than that which the part he has out of the partnership will bear to his separate debts. Usually, a merchant has nearly all of his means in his partnership, and yet he will, in various ways, be incurring separate debts. In these cases, we wholly fail to produce the desired equalization of the two sets of creditors. In the remaining cases we may, perhaps, accomplish the object, but if we do so we shall have to do it through the instrumentality of a bill in equity, with all its incidents and risks of lawyers, receivers, deaths of parties, losses by accident, consuming delay; and these are so devouring that the part of the fund left for proportionate division among all the creditors, will generally be so small that the dividend to those creditors most benefitted by the rule will be no greater than what their dividend would have been by the old rule—the rule which lends creditors of the partnership, first on the partnership effects, and creditors of the separate partner, first on his separate effects.

However, the decision in *Cleghorn vs. The Insurance Bank*, was in a case in which the older judgment was against *the partnership*; and the decision was, that the judgment had the right to be paid out of the separate property of a partner, in preference to a younger separate judgment against that partner.

This decision was followed in *Baker, Wilcox & Co. vs. Wempe, et. al.*, (19 Ga., 87,) and in *Dennis, et. al., vs.*

Green, adm'r, (20 Ga., 386). As to this last case, although the *judgment* in it sustains me in what I have said, yet the *opinion* misconceives the facts of it, and is calculated to mislead. The judgment was, that the court's charge was wrong, and the charge was, that if the separate estate of Causey was not more than sufficient to pay the separate debts, that estate was not liable to the judgment against him, as survivor, founded on the debt due from the partnership.

As to the present case, none of the debts are in judgment. Therefore, so far as the present case is concerned, it cannot be that the acts under notice have affected the common law doctrine.

Another act is, the act of 1792, "to protect the estates of orphans," &c., so far as it prescribes the order in which the debts "due by any testator or intestate shall be paid by executors and administrators." This act declares that such debts "shall be paid" "in the order following, viz: funeral and other expenses of the last sickness, charges of probate of will, or of the letters of administration; next debts due to the public; next judgments, mortgages and executions—the oldest first; next rent; then bonds or other obligations; and lastly, debts due on open accounts; but no preference whatever shall be given to creditors in equal degree, where there is deficiency in assets, except in cases of judgments, mortgages that shall be recorded, from the time of recording, and executions lodged in the sheriff's office; the eldest of which shall be first paid; or in those cases in which a creditor "may have a lien on any part of the estate."—Pr. Dig., 228. The last case here excepted, is that in which a creditor "may have a lien on any part of the estate." The right which, by the common law doctrine, the partnership creditors have, to be preferred as to the partnership effects, and which the separate creditors of the partners have, to be preferred as to his separate effects, is a right which, with-

out much violence to language, may be called an equitable *lien*. Consequently, this act of 1792, instead of repealing the common law doctrine, requires that doctrine to be observed. It requires executors and administrators, in the order of their payments, to respect existing liens.

This act, then, does not, as we think, change the common-law doctrine. And this court has so decided, in one if not the two cases; in the case of Thornton vs. the administrator of Wooldridge, if not also in the case of Semmes vs. Boykin, et al. These two cases were decided at Macon, in January, 1859.

We cannot recall any statute which we think ought to be regarded as changing the common law doctrine. It must follow, therefore, that, in our opinion, that doctrine is in force, so far as the present case is concerned—a case in which none of the debts are in judgment, and in which the partner having died, his assets are to be administered according to a statute that requires liens to be respected in the administration of assets.

Consequently, we must reverse the judgment of the court below. The effect of the reversal of that judgment will be to open the whole case, and to give the court below an opportunity of applying the principle of this decision, to every part of the case to which it is adapted.

Judgment reversed.

BROWN ET AL. EX'RS vs. WEAVER ET AL.

1. A will should be so construed, if possible, as to give effect to every part; and hence, words which make a plain inequality between sons on the one hand and daughters on the other, will not be overruled by other words, unless the latter words are incompatible with the first.

Brown et al. Ex'rs va. Weaver et al.

2. A bequest to daughters and their children, the daughters having no children in life at the time of the bequest, and if they shall die without issue then over—would create an estate tail in real estate, and hence under our law creates an estate absolute passing to the husbands on marriage; and such husbands having received such estate consisting in part of proceeds of a sale of land, and having for many years acquiesced in such sale, cannot afterwards set it aside on the ground that the executor was a purchaser at his own sale, the sale having been a fair one at the time.

In Equity, in Walton superior court. Decision by Judge HUTCHINS, February Term, 1859.

This was a bill in equity for discovery, account and distribution in Walton superior court, tried before Judge Hutchins at the February Term, 1859. The case comes on an agreed state of facts. George R. Brown died, leaving a will, of which the following is a copy, so far as relates to the issues in this case: "Item 2d. I give and bequeath unto my beloved wife during her widowhood all my property, real and personal, subject, however, to the provisions hereinafter mentioned, &c.

Item 3rd. I have heretofore given and I now convey and confirm unto my son Samuel A. Brown, land, &c., valued at three hundred and fifty dollars.

Item 4th. It is my will and desire that if my sons William, John and George should marry, or wish to settle themselves before the death of my wife, then and in that event, my wife shall give off and assign to each of them a fraction of land and other property equal in value to that given to their brother Samuel, and to my son George a horse, saddle and bridle, equal in value to that heretofore given to his brothers William and John. As my aforesaid sons shall marry, my wife shall loan to each of them such negro boy as she can most conveniently spare, to be kept by my said sons till the death of my said wife, provided they all live here.

Item 6th. It is my will and desire that as each of my

daughters Mary, Jane, Margaret and Elizabeth shall marry, my wife shall give off to each of them respectively a portion of property equal in value to that heretofore given to their sister Nancy, with a good horse, saddle and bridle, and at the same time my wife shall loan to each of my said daughters such negro girl as she can most conveniently spare, to be kept by my said daughters till the death of my wife, provided they outlive her.

Item 7th. It is my will and desire that if my wife shall ever marry again she receives an equal share of my estate with my children, &c.

Item 8th. It is my will and desire that at the death of my wife, my children, to-wit: Margaret, Jane, William, John, Mary, George and Elizabeth have been made equal as *aforesaid*, with their said brother Samuel and sister Nancy; the balance which may then remain, shall be equally divided share and share alike between my said children, Samuel, Mary, Jane, William, John, Margaret, George and Elizabeth," and the children of Nancy to take her share.

"Item 9th. I desire that upon the death of my wife, each of the negroes so loaned as *aforesaid*, shall, with the issue of such negroes be brought back into my estate to be equally divided as my other property as *aforesaid*.

Item 10th. I hereby nominate my two sons, William and John trustees for my daughters Mary, Jane, Margaret and Elizabeth, and I desire that the portions to come to them as hereinbefore mentioned, shall pass to and vest in the said trustees for the use of my said daughters and their children, and if my said daughters die without issue then their said property to revert to my estate to be divided among my then surviving children."

Margaret, (who with her husband is one of the complainants,) and Elizabeth, (whose son suing by his father father and guardian is the only other complainant,) had no children when the will was made. In 1848 the execu-

tors under an order from the court of ordinary, sold the real estate; and two of them, William and John, became purchasers. The sale was a fair one and the land brought its fair price at the time. Both Margaret and Elizabeth were married many years before the commencement of this suit. The executors divided out the estate, (the widow having died without marrying again,) in the first place making each of the sons equal with Samuel, and each of the daughters equal with Nancy, and then dividing the remainder equally among sons and daughters alike, and in the settlement turning over to the trustees of the daughters their parts of the proceeds of the lands. This bill was brought to undo this division and procure an equal division of the entire estate among sons and daughters alike, and also to set aside the sale of the land. Judge Hutchins held that the complainants were entitled to such equal division of the entire estate, but held that the sale of land could not now be disturbed. The executors, who were defendants in the bill, excepted to the ruling on the first point, and both parties ask a decision on the last point.

By the Court.—STEPHENS, J., delivering the opinion.

1. We think the words of this will clearly express the idea, that in the first place, all the sons besides Samuel shall be made equal with him when they marry or settle in life; and that all the daughters besides Nancy shall be made equal with her when they marry, and then the residue of the estate is to be equally divided among all, sons and daughters alike. Nor can the effect of these words be overruled by certain other words directing that the wife, in the event of her subsequent marriage, shall have an equal part with the children. The implication sought to be drawn from these last words is, that the wife is to be equal with *each* of the children, and that; therefore,

each of the children must be equal with every other one. It is enough to say that this direction applies only in case of the marriage of the wife, and she died without marrying. The testator makes a difference between his sons and his daughters, and the words which are claimed to have done away this difference and introduced equality as the rule, were not to have any effect at all unless the widow should marry. It is no valid objection to this construction to say that, to make the equality of his sons and daughters with one another depend upon the mere marriage of his wife, would be a whimsical notion in the testator. Testators have a right to indulge even their whims. But we think the natural construction of the words when considered with reference to their collocation and the context, is not that the wife, (in the event of her marriage,) was to be made equal with *each* child, but simply that she was to have a *child's part*, leaving the remainder to be divided among sons as one class and daughters as another class, according to the clear directions expressed in the other parts of the will. This construction relieves the will from the imputation of whimsicalness, and makes it consistent throughout. We think the court erred in adopting a construction which makes different portions of the will conflict with each other, while there is a construction which makes all harmonious and all rational.

2. The executor's sale was a fair one, and we concur with the court below in thinking that the acquiescence in it has been too long to allow it to be disturbed now. This acquiescence has been given by the husbands of Margaret and Elizabeth, who are the real owners of the interests claimed by the complainants. The legacy to them and their children, and if they should die without issue then over, would be an estate tail in real property and therefore, by our law is an absolute estate in Margaret and Elizabeth, and passed to their husbands on mar-

riage. The acquiescence, therefore, on the part of the husbands, was by persons who held the legal interest, and having extended as it has through many years, it ought to preclude any disturbance of the sale at this late day on the ground that the executors were purchasers at it.

Judgment reversed.

MARTIN vs. MITCHELL.

1. On the trial of a caveat, the court having put to the jurors the question, whether they had formed and expressed an opinion as to which party ought to prevail, was requested by the caveator to ask those of them who answered this question, yes, the further question, what was the foundation of their opinion; and the court refused to put this further question.

Held, That such refusal was not a sufficient ground for a new trial.

2. A person who, by a release, has freed himself from all interest on the event of the suit, is competent as a witness.
3. It is sufficient that the will of a person nearly blind, is read to him; it is not necessary that the reading should be in the presence of the witnesses.
4. That a jury may not think the provisions of a will, morally right, is not sufficient to authorize them to set the will aside.
5. A juror, during the progress of the trial, slept one night in the same room with one of the counsel for the prevailing party, but it was a room in a tavern, and the only spare lodging place left; he paid his own expense; slept in the same bed with the sheriff; there was no conversation about the case; and there was evidence quite sufficient to support the verdict.

Held, That this was not a sufficient cause for setting aside the verdict.

Caveat to Will, in Jackson Superior Court. Tried before Judge HUTCHINS, September, 1858.

This was an appeal from the court of ordinary admitting to probate a paper, propounded as the last will and

testament of William D. Martin, deceased. At the trial in the Superior Court, counsel for propounder moved that the grand jury be brought into court and purged. This motion was not resisted, and the grand jury were ordered to be brought in, and each juror sworn on his *voir dire*. To each, the following questions were asked: "Have you formed and expressed an opinion as to which party ought to prevail in this cause?" and, "have you any wish or desire as to which party ought to succeed in this cause?" Counsel for the caveators moved the court to ask the jurors, upon their answering the first question in the affirmative, the further and additional question, "what was the source or foundation of that opinion?" The court refused to ask such additional question, and this constitutes the ground of caveator's first exception.

After the jury was selected, propounder opened his case, and called as a witness John McCulloch. Caveators objected to his being sworn, upon the ground that he wrote the will and his wife took a legacy under it. Propounders offered a release signed by McCulloch and wife, conveying their interest under said will to their children, and a resignation of his office of trustee of the Academy and Church in the village of Jefferson, to which legacies were given by said will. The court therefore ruled the witness competent, and he was sworn and testified. To which decision caveators excepted.

After the testimony was closed, counsel for caveators requested the court to charge the jury, that if the testator was unable to read from blindness or any other cause, the will must be read once before witnesses and acknowledged, in their presence, by the testator, or there must be otherwise sufficient proof of his knowledge of the contents of the paper, which the court charged, except that the will need not be read to or before the witnesses.

Counsel for caveators further requested the court to charge the jury, that in considering the capacity of the

testator and the question of undue influence, it was competent for them to consider the provisions of the will in regard to their unreasonableness and violation of good sense and the usual impulses of the human heart. This the court refused, but charged the jury, "that in considering the evidence of capacity, they may look to the provisions of the will to ascertain whether it is consistent with reason and is the offspring of a sane mind, but not for the purpose of deciding whether the bequests are right or wrong in their opinion."

To which charge and refusal to charge counsel for caveators excepted.

The jury found for the propounder, whereupon caveators moved for a new trial, on the ground that one of the jury who had the case in charge, and before the same was terminated—the trial having occupied more than one day—remained all night at a hotel, in the village, belonging to one of the legatees under said will, and slept in the room occupied by Gabriel Nash, Esquire, one of the attorneys for the propounder.

There was another ground for a new trial, but it was abandoned by counsel for caveators.

The court refused the motion for a new trial, and caveators excepted, and assign as error all the rulings, charges, refusals to charge and decisions before excepted to.

HILLYER, and OVERBY, for plaintiff in error.

W. H. HULL, and T. R. R. COBB, *contra*.

By the Court.—BENNING, J., delivering the opinion.

We rather think that the court below was right, in refusing the request of the caveator's counsel, to ask the jurors answering the first question put to them, in the affirmative, the additional question, what was "the source or foundation of that opinion?" We rather think, that,

by our law, as it is now, the formation and expression of an opinion, by a person, that one of the parties ought to prevail over the other, is, in all cases, a disqualification to him, as a juror. By our law, as it is now, the jury are sworn to decide according to the evidence. By the old law, a juror might decide on his own private knowledge; and, indeed, he was deemed the best juror, who had private knowledge of the case, who was a *witness*. Hence, it was, that jurors were taken from the vicinage.

But it is not necessary to decide this question. The effect of not putting the proposed question was merely, to exclude the juror, and to substitute for him another juror who had not expressed any opinion at all, whether an opinion founded on personal knowledge, or one on something else. Now, to such a juror there could be no objection. He would at least be as good a juror as the other could have been.

Then suppose the case was, that the jurors formed and expressed an opinion, was an opinion against the caveator. Would the rejection of such a juror be a ground on which *he* could found an objection? Certainly not. And it does not appear in whose favor their formed and expressed opinions were.

[1.] We think, then, that this is not a sufficient ground for a new trial.

[2.] The release executed by McCulloch and his wife freed him from all interest in the event of the suit. And that was enough to make him competent as a witness. The fact that the release was to his children, was a fact to affect his credit only. This is too well settled to be questioned.

[3.] We think that the qualification made by the court, to the charge first requested, was proper. It is sufficient, if a will be read to a blind man; it is not necessary that the reading should be in the presence of the witnesses to the will. The statute of frauds does not go that far.

[4.] In the refusal of the second request to charge, and in the charge given in lieu of that request, we understand the court, merely to have let the jury know, that, although they might deem the making of such a will as the one before them morally wrong, yet that their so deeming it would not authorize them to find the will a void will. And thus understanding the court, we see nothing amiss in what the court said and refused to say. A man, in making his will, is not bound to square its provisions, by the opinion which others may entertain of their morality or justice.

[5.] There was nothing to excite suspicion in the fact that one of the jurors slept in the same room with one of the counsel for the prevailing party. The room was in a public tavern; there was no conversation about the case; the juror slept in the same bed with the sheriff; that was the only spare lodging place in the tavern; the cost of the lodging was defrayed by the juror himself; the evidence was quite sufficient to justify the verdict. Still, it is but proper to say, that even such conjunctions are to be regretted; and that they ought to be carefully scrutinized.

Judgment affirmed.

CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT SAVANNAH.
JUNE TERM, 1859.

Present—JOSEPH H. LUMPKIN,
HENRY L. BENNING,
LINTON STEPHENS. } Judges.

BROWN, ADM'R, vs. STRICKLAND.

An administrator's letters are not abated by his removal out of the State.

Trover in Wayne superior court. Tried before Judge COCHRAN, at February Term, 1859.

This was an action of trover by William M. Brown, as administrator of Aaron Strickland, deceased, against John Strickland, jr., for the recovery of a family of negroes, alleged in the declaration to belong to plaintiff, as administrator aforesaid.

At the trial it appeared and was admitted, that since the commencement of the suit, the plaintiff had removed from the State, and was now a resident and citizen of the

State of Florida. Whereupon the court held and decided that plaintiff's letters of administration abated and determined by his removal from the State, and that the same could not be admitted in evidence in support of his title in this cause.

To which decision counsel for plaintiff excepted and assigned the same as error.

J. S. WIGGINS, and NORWOOD & WILSON, for plaintiff in error.

JNO. L. & B. F. HARRIS, and T. T. LONG, *contra*.

● *By the Court.*—STEPHENS, J., delivering the opinion.

In the case of Walker vs. Torrence, reported in 12 Ga. Rep., this court held that an executor's letters were not abated by his removal out of the State. The opinion in that case was well considered, and we are entirely satisfied with it. There being no difference in principle between the case of an executor and that of an administrator in respect to this matter, the judgment below must be reversed.

Judgment reversed.

STYLES vs. THE STATE.

When two judges only of the supreme court preside in a cause, (the third being absent from Providential cause,) and they cannot agree upon a judgment after the same has been heard and considered, and the writ of error is stricken from the docket, and these facts are certified in the remittitur by the clerk of this court to the court below, it is not error in the circuit judge to order a judgment of affirmance, to be entered upon his minutes.

Murder, in Glynn superior court. Decision by Judge COCHRAN, at February Term, 1859.

The case of Carey W. Styles, plaintiff in error, against the State of Georgia, was brought by writ of error and bill of exceptions to the supreme court, held at Savannah, January term, 1859. At that term of the supreme court, Judge Lumpkin, one of the judges, being absent from providential cause, the court met, was organized and held by the other two judges, who were present—McDonald and Benning. The above case of Styles against the State being called in its order was heard and argued, but the presiding judges not being able to agree, no judgment was delivered or pronounced, and the case was stricken from the docket; and the clerk of the supreme court transmitted to the court below the following certificate, or remittitur:

STATE OF GEORGIA. }

SAVANNAH, 1ST DISTRICT. }

Thursday, 20th January, 1859. }

The Honorable the supreme court met pursuant to adjournment—present their Honors Charles J. McDonald and Henry L. Benning, judges.

Carey W. Styles, plaintiff in error, }
vs. } Murder from Glynn.
 The State of Georgia. }

Their Honors, Charles J. McDonald and Henry L. Benning, presiding in this case, there was no judgment rendered, and the case stricken from the docket.

Bill of cost. Case carried to judgment, \$3 75; recording proceedings, \$2 25; recording opinins, \$3 50; remittitur, \$1 25; sheriff, \$1 50=\$12 25

SUPREME COURT OF GEORGIA. }

CLERK'S OFFICE, Milledgeville, 22d Jan., 1859. }

I certify that the above is a true extract taken from

the minutes, and that Messrs. Law, Barton and Lovel, paid the above bill of costs.

Given under my hand and Seal of Office.

ROBERT E. MARTIN, Clerk.

At the February term, 1859, of Glynn superior court, the Solicitor General, on behalf of the State, moved the following order :

Glynn Superior Court, February Term, 1859.

The State	}	Indictment for murder.
<i>vs.</i>		The above cause having been carried
Carey W. Styles.		up to the supreme court, by writ of

error at the instance of the defendant, and the clerk of said court having transmitted a certified copy of the proceedings had thereon—It is ordered that the same be entered on the minutes and be made the judgment of this court.

And it appearing from said certificate that the said cause in error was stricken from the docket of the supreme court—It is further ordered that the above cause do proceed.

Counsel for Styles objected to said order, on the ground that said certificate does not show any order or judgment of the supreme court, and that said court had not, in the terms of the organic act, heard and determined, at the first term of said court, the questions made in the bill of exceptions, and had not affirmed or reversed the judgment of the superior court, complained of and assigned as error.

The court overruled the objection and granted the order. To which decision counsel for defendant excepted.

BARTOW, and Sol. Gen., represented by T. N. GARDNER, STUBBS & HILL, for plaintiff in error.

H. V. JOHNSON, represented by GEO. GORDON, and LLOYD & OWENS, and E. A. NESBIT, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

We think the circuit judge was right in making the remittitur the foundation of a judgment of affirmance in the court below. It showed two things—1st, that the two judges, who alone presided in the case, disagreed; and, 2dly, that the case was stricken from the docket. Pursuing, therefore, the practice hitherto adopted, both upon principle and authority, and acted upon in a number of cases similarly situated, the circuit judge entered a judgment of affirmance in the court below.

It is argued that in as much as no formal order was passed directing this case to be stricken from the docket, the entry on the minutes to that effect was a clerical mistake, and should be corrected. To which it may be satisfactorily replied, that the minutes of the court containing this entry were read and *approved by the court*; and thus its official sanction was deliberately given to this entry.

This being so, no principle is better settled of more universal application than that no court can annul its own judgment for error of fact or of law, after the term at which it has been rendered.—12 Peters, 491; 3 Howard, 413; 25 Wendell, 252; 14 Ala. 648; 15 *ib.* 802. By the constitution and organic law, this case had to be heard and determined at the last term, unless prevented by providential cause. It was heard. The determination of *the court* was to strike it from its docket, not by accident, but with the understanding that the direction thus given to it would operate as an affirmance of the judgment below. It is too late to reach and reverse this action.

The case of Burwell, Jordan et al. against Brigham, Kelly & Co., occupies the same position; and consequently the motion to reinstate this case must be denied for the same reasons.

For myself, I am free to say, that I put my judgment

in these cases upon broader grounds. I hold in conformity with the practice in the House of Lords in England, when sitting as a court of errors in the last resort—with the court of errors, in New York, in South Carolina, in Virginia, and so far as I have examined, every other State in the confederacy, in the Supreme Court of the United States, and I believe every other court in the civilized world, (except where by positive enactment provision is made for a rehearing,) that a failure to reverse on account of a divided court is equivalent to a judgment of affirmance; and that there is nothing in the constitution or act of 1845 establishing this tribunal, to necessitate a contrary rule, when one of the three judges is absent from providential cause, or disqualified from presiding on account of some personal disability, such as being a party—of kindred to the plaintiff or defendant, &c.

If it be the good pleasure of the legislature to make provision for any or all of these cases, let it do so by statute.

Judgment affirmed.

HOPKINS, ALLEN & CO. vs. COOPER & GILLILAND.

A representation, that a person may be safely credited, if it does not indicate, with reasonable certainty, the amount for which it will be safe to credit him, is too uncertain to give a right of action.

Deceit, in Chatham Superior Court. Tried before Judge FLEMING, at January Term, 1859.

This was an action on the case by Hopkins, Allen & Co. against Cooper & Gilliland, for falsely and fraudulent-

ly giving to one William H. Turner, of the firm of Preston & Turner, a letter of credit, knowing that he was unworthy of credit, and by reason of which letter, plaintiffs sold to said Turner & Preston a bill of goods amounting to about twelve hundred dollars, whereby they were damaged, &c.

At the trial, counsel for plaintiff, amongst other things, tendered in evidence the letter of credit written by defendants, referred to and set out in the declaration. The following is a copy thereof:

SAVANNAH, March 8th, 1852.

Messrs. ADAMS & HAWTHORN,

Gents.:—We have been called on by Wm. H. Turner, of the firm of Turner & Preston, of Thomasville, in this State, but formerly of this city, for a letter of recommendation to your city. We can say for Mr. Turner that he owns property in this city, and he has a very good turn for business. He has located himself in Thomasville, and from all we can learn, has very flattering prospects before him, and from our personal knowledge of him, make no doubt he will be successful in his undertaking. Should you be called on in his behalf, you will please state these facts for us, as he has no acquaintance in your city.

Respectfully, COOPER & GILLILAND.

Counsel for defendants objected to the admission in evidence of this letter, on the ground that, even if genuine, it was not such a guaranty or letter of credit as would create any liability on the part of defendants for damages sustained by plaintiffs in selling goods to Turner, or to Turner & Preston. After argument, the court sustained the objection, and excluded the letter, and thereupon ordered and directed a verdict. To which ruling and judgment plaintiffs excepted, and assigned the same as error.

NORWOOD, WILSON & LESTER, for plaintiffs in error.

LLOYD & OWENS, *contra*.

By the Court.—BENNING, J., delivering the opinion.

Was the court below right in excluding the letter from the jury? We think so.

It is not insisted by the plaintiffs' counsel that this letter could make the writers of it liable for any amount whatever of goods that might be sold to Turner by the persons for whom it was intended. But where are we to draw the line? There is nothing in the letter to tell us; and if we go outside of the letter, we go into the region of mere speculation, where, on the same facts, one judge, one jury, would put the line here, another there. A representation of this sort, in order to give an action against the person making it, ought to carry within itself something to indicate, with reasonable certainty, the amount for which it is intended to say, that the person in whose favor the representation is made, may be credited. How much does the representation mean to say that the man will be good for? The representation ought to have, on its face, something from which an answer to this question may, with reasonable certainty, be drawn.

In *Pasley vs. Freeman* (3 Term R.) the representation said, that the man would be good for sixteen bags of cochineal. In *Slade vs. Little*, (20 Ga., 371,) this court acted on this view. There is nothing to the contrary of this view in the *judgment* in *Bennet vs. Terrel*. There the judgment was an affirmance of the judgment of the court below; and that was a judgment, in effect, that, unless the representation was fraudulent it was not actionable.

We think, then, that the court was right in excluding this letter.

I will repeat for myself, that I have seen nothing to change my opinion of *Pasley vs. Freeman*. On the contrary, every day more and more convinces me that that case, and all similar cases, are mere evasions of the statute of frauds; and so, doubtless, thought the British parlia-

ment, for they soon provided for such cases a statute similar to the statute of frauds. See *Savage vs. Jackson* (19 Ga., 305,) for my opinion on the question.

Judgment affirmed.

ALLEN vs. THE STATE OF GEORGIA.

1. The case of a witness introduced to impeach another witness, forms no exception to the general rule against the asking of leading questions.
2. A request by defendant to charge that he was justified in shooting after prosecutor had attempted to shoot him, is objectionable, because it *assumes* the fact that prosecutor had attempted to shoot him ; and also because that fact *alone*, without its appearing for instance whether or not the prosecutor was continuing the combat, does not constitute a justification.
3. Under an indictment for shooting at another, it is a very material matter whether or not the gun is loaded, and how loaded.

Indictment for assault with intent to murder, and for shooting at another. In Burke Superior Court. Tried before Judge Holt, at May Term, 1858.

Jesse J. Allen was indicted for an assault with intent to murder one Elijah A. Gordon. There was also a count "for shooting at another," contrary to the statute in such cases made and provided. The case was tried before Judge Holt, at May Term, 1858, and the Jury returned a verdict of guilty, under the second count. The defendant moved for a new trial on eight grounds, three only of which were relied upon and insisted on before the Superior Court, viz :

1st. That the Court erred in permitting the Attorney General, after asking William Anderson, a witness for

defendant, whether or not he had made certain statements, relative to the case, to Ephraim Ponder, at two several places and times designated, to introduce said Ponder as a witness to impeach Anderson, and to read to Ponder, from a paper held in his hands, the statements denied by Anderson, and to ask him, Ponder, whether or not Anderson had, at the times and places named, made such statements to witness—counsel for defendant objecting to this mode of interrogation, as leading and illegal, and insisted that the Attorney General should ask the witness whether or not Anderson, at the times and places designated, had made any and what statements to him relative to the case, or to the like effect.

2d. That the Court erred in refusing to charge the Jury, when requested by defendant's counsel in writing, "that if the constable was acting *de facto* or *de jure*, the defendant was justified in shooting, after the attempt of that constable to discharge a rifle at defendant, by snapping it three or four times before resistance by defendant."

3. That the Court erred in charging the Jury, that under the second count in the indictment, (*viz*: for shooting at prosecutor,) it was perfectly immaterial, regarding defendant's guilt, whether the pistol discharged by him was loaded with ball or shot, or not.

The Court refused the motion for a new trial, to which decision counsel for defendant excepted, and assigns the same as error.

JENKINS, represented by JNO. K. JACKSON and A. H. H. DAWSON, for plaintiff in error.

Attorney General McLaws, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

1. The questions put to the impeaching witness in this case were excessively leading, and we think, for that rea-

son, were irregular and improper. There can be no good reason for relaxing in favor of an impeaching witness the general rule against the asking of leading questions. This is a case where it devolves upon the Jury to *weigh* testimony in a peculiar sense, and it is, therefore, important that the witness should first be left to exhaust his memory on the subject, without the aid of leading, in order that the Jury may see how far he speaks from his own memory, and how far from suggestion. This is an important test in *weighing* the value of testimony.

2. The charge requested by defendant, that he was justified in shooting at the prosecutor after the prosecutor had attempted to shoot him, is wrong in two respects. It *assumes* that the prosecutor had attempted to shoot him, a fact which was contested in the case, and should have been submitted to the Jury. But it also states the law erroneously. It does not follow that the defendant was justified merely because he shot *after* the prosecutor had attempted to shoot him. The prosecutor might have *abandoned* the combat, and then the defendant clearly would not have been justified in shooting. To constitute a *justification*, something more must appear than the single fact that the defendant did not shoot until an attempt had been first made to shoot him.

3. We think it is a most material matter whether the gun is loaded or not, and how loaded, under an indictment for shooting at another, ~~contrary to the act of 1850.~~ To shoot *at* implies an *aim*, and intent to *hit*, and therefore the nature of the load is important in judging of this intent. If the character of the load at a distance, as, for instance, a mere powder gun at twenty yards distance, renders it impossible that the load could take effect, a reasonable man could not be presumed to *intend* that consequence. So the nature of the load is an important matter in enabling the Jury to judge whether the defendant merely shoots or shoots *at*—whether he has or has not an

intent to hit. This we are satisfied is the sound construction of this act. And for myself, I do not hesitate to say that the act is one which ought to be most strictly construed against the prosecution, and most liberally in favor of the accused. So far from its being a salutary law, as pronounced by the Court below, I regard it as a very hard law, and as involving absurd consequences. The only justification it allows is *self defence*, which properly cannot include more than defence of life and person. Now, there are many cases under our law where a man may *kill* another not in self-defence, as in defence of habitation, and in some cases in defence of property. In these cases he *kills* and is *justified*, but if he shoots and *misses*, he incurs the penalty of this act, according to its strict terms. The penalty falls not on him who shoots and kills, but on him who shoots and misses. Its penalty, therefore, seems to be leveled at *bad shooting*, and yet no such thing can be presumed to have entered into the intention of the Legislature. This is enough to show that the act is one which calls loudly for the enforcement of that rule which in penal laws construes strictly against the prosecution, and liberally in favor of the accused.

Judgment reversed.

THE SOUTH CAROLINA RAIL ROAD COMPANY
vs. MOORE & PHILPOT.

1. There is a case pending in court between A and B. By a rule of the court it is referred to arbitrators, with the stipulation that no appeal shall lie therefrom to any court, "except for fraud, accident or mistake;" with the further provision, that the arbitrators be guided by the rules laid down for the regulation of arbitrations in

the act of March 5th, 1856." Subsequently, the parties enter into an agreement out of court, submitting other matters, as well as those embraced in the suit, to arbitrators. The submission recites the rule of court and then declares that the arbitrators "shall be subject to the terms and provisions of the act of 1856 and the rule of reference which had been taken by the court in the case stated. *Held*, That either party was at liberty to except to the award "for fraud, accident or mistake, "according to the rule of reference," "and that the parties were not restricted to the right of objecting to the award merely on the ground of "fraud and corruption" in the arbitrators, according to the 15th and 16th section of the act of 1856, and that the reference to that act in the rule and the submission was only to make it a guide to the arbitrators in the mode of conducting the proceeding.

2. An arbitrator cannot impeach his award eight days after it has been signed by him and soon after it has been published to the parties.
3. The erection of a bridge across a navigable stream, so low as to obstruct the passage of boats, is a public nuisance.

A public nuisance is the subject of *indictment* ; not of *action*.

If, by a public nuisance, a party suffer particular damage, an action lies.

For any obstruction to the public highway, or a navigable stream, which is a public nuisance, though such obstructs the plaintiff's business, an action on the case cannot be maintained by the party so obstructed, unless under special circumstances ; the only remedy being by indictment.

4. If an arbitrator act manifestly against law, and the error appear on the face of the award, the court will set aside the award.

A submission to arbitrators, provided amongst other things that out of the amount found for the plaintiffs, their counsel's fees should be deducted, and by the award made payable by the defendants, directly to the attorneys. An award was made making said provision. *Held*, That the counsel of plaintiffs were not necessary party to the motion to set aside the award ; nor to the writ of error sued out to reverse the judgment of the court made upon the award.

Award, in Richmond Superior Court. Decision by Judge HOLT, at November Term, 1858.

This was originally an action on the case brought by John A. Moore and Thomas N. Philpot, owners of certain steamboats on the Savannah River, against the South

Carolina Railroad Company, to recover damages, alleged to have been sustained by plaintiffs, by the erection of a railroad bridge across the Savannah river, opposite the city of Augusta, by the defendant, whereby the navigation of said river was obstructed, and plaintiffs, as steamboat owners, injured and damaged to the amount of ten thousand dollars.

The declaration and pleas are as follows, viz :

State of Georgia, }
 Richmond County. }



To the Honorable the Superior Court of said County :

The petition of John A. Moore and Thomas N. Philpot, respectfully sheweth : That the South Carolina Railroad Company, a corporation which has extended the track of its road from the State of South Carolina into the City of Augusta, in the County and State aforesaid, where it is doing business, has greatly damaged your petitioners :—

For that heretofore, to-wit: on the fifteenth day of March, in the year of our Lord eighteen hundred and fifty-three, your petitioners were, and ever since have been common carriers by steamboats on the Savannah river, a navigable stream of said State of Georgia, between the mouth of Hawk's gully (above the said City of Augusta,) and the City of Savannah, in the said State of Georgia, and by right ought to have had, and still of right ought to have the use of the said navigable communication for the carriage of goods, wares and merchandise in their said boats in, upon and along said river between the places aforesaid. And whereas, before and at the time of the committing of the grievances hereinafter mentioned, the steamboat Fashion, owned by your petitioners, common carriers as aforesaid, was proceeding in, upon and along said river, with divers goods, wares and merchandise, therein to be carried and conveyed therein from Augusta, aforesaid, to Savannah aforesaid. Yet the said South

Carolina Railroad Company well knowing the premises, but contriving and intending to injure your petitioners in this respect, and to deprive them of the use and benefit of the said navigable stream, and to put them to great trouble, inconvenience and expense, whilst the said boat and the goods, wares and merchandise therein were so proceeding in, upon and along said river, to-wit, on the day and year aforesaid, and in the county aforesaid, and on divers other days and times between that day and the filing of this petition, by reason of a bridge unlawfully and improperly constructed by it over and across the said river, wrongfully, unjustly, and unlawfully obstructed said stream, and thereby stopped, prevented and hindered the said boat of your petitioners, laden as aforesaid, from proceeding in, upon and along the said river for a long space of time, to-wit, for the space of ten days, from the day and year aforesaid, and for the same length of time at each subsequent voyage between the places aforesaid, whereby your petitioners were not only deprived of the use, benefit and enjoyment of their said boat, but of all the benefit, profits and advantages which they might otherwise and would have made by the use and employment of the said boat, in the carriage and conveyance of goods, wares and merchandise in, and upon, and along the said river: All of which is to the damage of your petitioners ten thousand dollars.

Pleas:

And now come the defendants, by their attornies, and defend the wrong and injury, when, &c., and for answer say they are not guilty of the supposed grievances laid to their charge in the plaintiffs' petition in manner and form as said plaintiffs have therein complained against them, and of this they put themselves upon the country. And for further plea in this behalf, they say that their railroad bridge across the Savannah river, at and opposite the City of Augusta, was lawfully erected and is now maintained

under and by virtue of a contract entered into the 10th day of August, 1852, between them as parties of the one part, and the City Council of Augusta and the Trustees of the Academy of Richmond County, of the other part, which the said parties thereto were by competent authority fully empowered to make, and of this they put themselves upon the country.

And for further plea in this behalf, these defendants say, that if the said plaintiffs had sustained any damage whatever, in any way connected with the existence of their said railroad bridge, such damage has, without any wrongful act or default on the part of these defendants, resulted either from providential cause, or from the bad management, unskillfulness, or negligence of the said plaintiffs, their agents or servants, and of this they put themselves upon the country.

HENRY II. CUMMING, Defendants' Atty.

Upon the trial at common law, the jury found for the plaintiffs two thousand dollars, from which verdict defendants appealed. After the trial at common law, the following amendment of the declaration was made, by order of the court, viz :

Amendment by order of Court.

And now your petitioners further show, that being common carriers, as aforesaid, possessed of the steamboat aforesaid, at and between the fifteenth day of March, eighteen hundred and fifty-three, and the filing of this petition, and after the detention, delay and damage above set forth, occasioned by the construction of the said bridge by the said South Carolina Railroad Company, at a grade lower than the Augusta bridge, and without a draw, your petitioners found the risk, hazard and injury resulting from the act of taking their said boat above the said railroad bridge, so great, that they were obliged and compelled to abandon the attempt to make such passage,

as they were at any time liable to be detained with their said boat many days above said bridge, by a sudden fall of the river, and to cease taking freight from and carrying the same to the wharves above said bridge, and thereafter to load and unload their said boat at a point below the Augusta bridge, remote from the centre of business, in said City of Augusta, and especially distant from the places of business of many of the largest merchants in the city, who have been the patrons and customers of said boat, at a point to reach which drayage, labor and time were much increased, so that other carriers having boats differently constructed, with tow-boats and barges, and lighters that could pass said bridge in any stage of water: Your petitioners' boat having been built upon principles which gave her light draught, and with special reference to the state of the stream and the Augusta bridge, and thus to dispense with the expense of lighters, &c.; were enabled to take from your petitioners and monopolize the business derived previously by your petitioners' said boat from the above sources, and that this more especially as the accommodations for wharfage, below said bridge, were not suited to the trade, and did not afford proper facilities, and as the access by drays in some states of the weather was very difficult.

By means of all which premises, your petitioners lost the business of carrying freight for many of their former customers, lost much valuable time, and many trips up and down said river, and were put to other and greater expense. All which wrongs and injuries, as well as in the delay and detention of your petitioners' boat, first above set forth, as in the loss to your petitioners of many trips by their boat (carrying freight), and of divers large quantities of freight withdrawn from said boat, as aforesaid, were caused by the unlawful conduct of said defendant, in erecting said bridge over said river, several feet lower than the Augusta bridge. And by all of which

South Carolina Rail Road Co. vs. Moore & Philpot.

your petitioners have been endamaged in the sum of thirty thousand dollars. Wherefore, they file this, their petition, plainly, fully, and distinctly setting forth their cause of action, &c.

Wherefore, your petitioners bring suit and pray process, requiring the said South Carolina Railroad Company to be and appear at the Superior Court next to be held in and for said county, then and there to answer your petitioners in an action of trespass on the case.

A. J. & T. W. MILLER, Plff's Attys.

At May Term, 1858, the case still pending on appeal, the following rule of reference to arbitration was taken and passed by the court, viz:

JOHN A. MOORE and

THOMAS N. PHILPOT,

vs.

THE SOUTH CAROLINA RAIL-
ROAD COMPANY.

} Case on Appeal.

THE UNION STEAMBOAT CO.

vs.

THE SAME.

The parties having agreed to refer the above cases to arbitration, it is on motion ordered, that the matters in issue in the same, be referred to the arbitrament and award of such persons as may be selected by the parties, one of the arbitrators to be selected by the plaintiffs in the cases, another by the defendant, and these two to select a third, who shall be satisfactory to the parties, their assent to be signified in writing, and the award of said arbitrators shall be final and conclusive between the parties, no appeal to any court lying therefrom, except for fraud, accident or mistake.

It is further ordered, that the said award be returned to this court, and be made the judgment of the court, in the above cases.

It is further ordered, that the parties have leave to be

represented by their counsel before said arbitrators, and that the latter be guided by the rules laid down for the regulation of arbitrations in the act of March 5th, 1856.

Afterwards, on the 11th June, 1858, the parties entered into the following further agreement and submission, viz: Georgia, }

Richmond County, } Whereas, John A. Moore and Thomas N. Philpot, owners of the Fashion Line of Steamboats, engaged in the transportation of freight upon the Savannah river, between the cities of Savannah and Augusta, on the fifth day of June, 1855, commenced their action against the South Carolina Railroad Company, alleging damage for and on account of losses and injuries and damage sustained by them by reason of the detention and delay of said boats, and by reason of the risk and hazard which (as they say) prevented said boats from passing above the bridge constructed over said river by said company, for a period of time between the 15th day of April, 1853, and the filing of their petition, to-wit, on the day and year aforesaid, and whereas, an order of the Superior Court, of said county, in which said action was commenced, and is now pending, has been taken, referring the matters in issue between the said parties, to arbitration under the provisions of the act of March 5th, 1856; and whereas, the said John A. and Thomas N., are claiming damages from the said Railroad Company for and on account of similar wrongs and injuries sustained by them, as they allege, since the 5th day of June, 1855, to the date of the award to be rendered, as proprietors of the said line of steamboats, from similar causes, viz, from the detention and delay of their boats, the "Fashion," "Fashion No. 2," "Atlanta," "Talamico," "Columbia," and the "Amazon," engaged in the transportation of freight between the ports of said cities, together with the injuries resulting from the difficulty and hazard of said boats passing above the bridge erected as aforesaid, by said company over the Savannah

river; the said railroad bridge having been constructed by the said company for the passage of trains on their railroad over the same, and maintained for this purpose; and whereas, the said parties in interest are desirous of determining and preventing litigation in relation to said matters in issue between them, and that justice should be done in the premises; therefore, they do now agree, the said the South Carolina Railroad Company, acting by its President John Caldwell, to submit all of the above matters to arbitration, subject to the terms and provisions of the said act of the General Assembly of the State of Georgia, and the rule of reference which has been taken in the case stated, leaving the arbitrators to decide the amount to be recovered of said company (if any), and all questions relating thereto; and for this purpose the parties have chosen Lambeth Hopkins, Esq., and Joseph Milligan as their arbitrators, and these two have made choice of James Hope, Esq., as a third arbitrator, and it is agreed that they shall proceed at once, and without delay, to hear the witnesses, and decide and adjudicate the said matters in issue, between the parties, and the award of the said arbitrators or a majority of them, shall be binding and obligatory upon all of the said parties in the premises, and shall be made in duplicate for the parties, and the original award shall be furnished to the next Superior Court of said county, to be made the judgment of said court, and entered on its minutes, as by the said act of March 5th, 1856, prescribed and required.

And it is further mutually agreed, that at the time when said award shall be made, the said John A. Moore and Thomas N. Philpot, shall execute full and complete discharges of the said South Carolina Railroad Company (if it be desired) from all claims and demands whatsoever, for the time embraced in the above submission, which discharge may be annexed to said award before the same is delivered to the parties, and the South Carolina Rail-

road Company agrees to pay the amount found against them, to the order of the said John A. Moore and Thomas N. Philpot, except the amount of counsel fees due by the said John A. and Thomas N. for and on account of the premises; which amount, by understanding with the parties, upon notification given by the said counsel to said company, as to the sum thereof, shall be paid to the said counsel in person, and that the costs of the case shall be paid according as the said arbitrators may tax the same, either by the one or the other party, or by both.

Witness our hands and seals, this the eleventh day of June, in the year eighteen hundred and fifty-eight, the erasure of the word damages being made before signing, in the tenth line from top of first page, the interlineation of the words "since the 5th day of June, 1855, to the date of the award to be rendered," in the 29th line from top of said page, being then also made, the erasures in the 9th, 10th, and 11th lines of second page, the interlineation of the word "arbitrators" in the 28th from the top of same page, and the erasure in the last line of said page, also the interlineation of the words "when said award shall be made," in the 16th line from top of 3d page.

JOHN A. MOORE, [L.S.]

THOS. N. PHILPOT, [L.S.]

JNO. CALDWELL, [L.S.]

Pres. So. Ca. R. R. Co.

The following is the award made by the arbitrators under the foregoing rule and argument, viz :

JOHN A. MOORE	}
and	
THOMAS N. PHILPOT,	
vs.	
THE SOUTH CAROLINA RAIL-	}
ROAD COMPANY.	

We, the undersigned, arbitrators chosen and selected by the parties to the foregoing submission, in the manner

therein set forth, having first given the parties legal notice of the time and place of meeting, and having first been sworn in the presence of the parties and of their counsel, according to the statute in such cases made and provided, met and heard the case submitted to us upon its merits: And we do award that "The South Carolina Railroad Company" do pay to the said John A. Moore and Thomas N. Philpot, for their damages, the sum of twenty-nine thousand nine hundred and ninety-two 70-100 dollars (\$29,992,77) less the amount of fees of the counsel of said John A. and Thomas N., and we award that the amount of such fees be paid by "The South Carolina Railroad Company," directly to the counsel. We further award, that all the costs of the case pending in the Superior Court of Richmond County, between the parties, be paid by the South Carolina Railroad Company, and that the compensation of the arbitrators, to-wit, the sum of one hundred and twenty dollars, be paid equally by the parties.

We further award, that a compliance with this award on the part of "The South Carolina Railroad Company," shall be and operate as a perpetual bar to any claim, or right of action by said John A. Moore and Thomas N. Philpot, against the South Carolina Railroad Company for any damage that they may have sustained, prior to the date of this award, by reason of the erection of the bridge across the Savannah river, by said company.

In witness whereof, we have hereunto set our hands and seals, this seventh day of July, eighteen hundred and fifty-eight.

LAMBETH HOPKINS, [L.S.]

JOSEPH MILLIGAN, [L.S.]

JAMES HOPE, [L.S.]

Served a copy of the within award on Henry H. Cumming, Esq., one of the attorneys of the defendants, this day, July 8th, 1858.

LAMBETH HOPKINS.

Served a copy of the within award on Millers & Jackson, attorneys of the plaintiffs, this day, July 8th, 1858.

LAMBETH HOPKINS.

Plaintiffs, at November Term, 1858, moved that the said award be entered on the minutes of the court. This motion defendant resisted, and filed the following exceptions and exhibits thereto, and moved that the said award be set aside and not made the judgment of the court, on the ground of mistake of the arbitrators in making their estimate of damages, viz :

1st. Said arbitrators allowed damages to the plaintiffs for possible prospective and speculative profits, which it was supposed said plaintiffs might have realized from their business, but for the erection of the bridge complained of in this action, which said profits on the hearing before said arbitrators these defendants by their counsel insisted were no legal ground for damages.

2d. After allowing damages for such profits as aforesaid, said arbitrators made no deduction from their estimate of damages on account of the profits actually realized by the plaintiffs, during the period when the injury sued for was alleged to have accrued.

And these defendants annex to these exceptions, by way of exhibit, to which they pray leave to refer, as parcel hereof, copies of communications addressed by one of said arbitrators to his associates, and duly furnished by him to the parties in the case or their counsel, the facts stated in which are verified by the affidavit of said arbitrator.

And these defendants pray the court, to call before it all of such arbitrators and examine them touching the premises.

And these defendants further except to any judgment being rendered in behalf of the plaintiffs in said case; for that it appears on the face of the record, that the plaintiffs have not and never had any sufficient cause of action against the defendants, but on the contrary said plaintiffs

in their said action claim damages for what by their own shewing is a public nuisance, for which no private action lies.

All which matters, said defendants allege in arrest of any judgment for said plaintiffs.

HENRY H. CUMMING,

WM. T. GOULD,

Attorneys for Def'ts.

(*Exhibits.*)

AUGUSTA, July 15th, 1858.

LAMBETH HOPKINS, Esq., Augusta :

Dear Sir—Since our last interview, on Monday, in relation to the award against the South Carolina Railroad Company, the doubts which I expressed to you, as entertained by myself, as to the correctness of that award, have been converted into a positive *conviction* that I was wrong.

I allowed a considerable amount, as you may remember, for prospective freight, and made the mistake of omitting to deduct a portion of the probable income that Mr. Moore's boats had received in the prosecution of their trips for the two years after they commenced running to the Central wharf, as testified by Capt. Philpot, and subsequently below the bridge.

As I have already stated to you, the doubts as to the correctness of allowing for prospective freight originated in my mind on last Friday evening, and I saw you the next morning in relation to that matter.

Under these circumstances, my purpose is formally to make known my dissent from the award as it now stands. As to the best mode of doing this, I am not yet determined. I shall furnish the counsel of each party with a copy of this communication, in the course of this week. I may perhaps deem this all that is necessary on my part. If I should determine to do anything more, you shall be

notified ; and I would be obliged to you for any suggestions you may be pleased to make me on the subject.

I am, dear sir, very truly, yours,

JOSEPH MILLIGAN.

Georgia, } Joseph Milligan being duly sworn,
Richmond County. } saith, that the facts stated in the foregoing letter, as to the basis assumed by the arbitrators in the foregoing stated case, are true, and that a copy of said letter was communicated to the counsel for the plaintiff within about a week of its date.

JOSEPH MILLIGAN.

Sworn to, and subscribed before me, Nov. 29th, 1858.

MICH'L F. BOISCLAIR, Not. Pub. R. Co.

(Copy.)

AUGUSTA, July, 15, 1858.

JAMES HOPE, Esq., Augusta:

Dear Sir—I called at your office several days ago to inform you, that I had serious doubts of the correctness of the principle I adopted in arriving at the amount awarded to Messrs. Moore and Philpot, against the South Carolina R. R. Company ; but was informed that you had gone to Nashville. These doubts have now given place to a conviction that I was wrong.

I allowed, as you may remember, a considerable amount for prospective freights, and the mistake of omitting to deduct a part of the probable income that Mr. Moore's boats had received in the prosecution of their trips for the two years after they commenced running to the Central wharf, as testified by Capt. Philpot, and subsequently below the bridge. The doubts as to the correctness of the principle I followed, in making the award, originated in my mind on Friday evening last, the 9th inst., whilst I was reviewing the several items which made up the aggregate. Having a painful sense of the consequence of my assent to it, I called on Mr. Hopkins the following

morning (Saturday,) and communicated to him my doubts. I also saw him on Monday ensuing and stated to him that my doubts had not been removed. Under these circumstances my purpose is formally to make known my dissent from the award, as it now stands. As to the best mode of doing this, I am not yet determined. I shall furnish the counsel of each party with a copy of this communication this week. I may perhaps deem this all that is necessary on my part. If I should determine to do anything more, you shall be notified; and I would be obliged to you for any suggestion you may be pleased to make on the subject on your return.

I am, dear sir, very truly, yours,

JOSEPH MILLIGAN.

Georgia, } Joseph Milligan being duly sworn,
 Richmond County. } saith that the facts stated in the foregoing letter, as to the basis assumed by the arbitrators in the foregoing stated case, are true, and that a copy of said letter was communicated to the counsel for the plaintiffs, within about a week of its date.

JOSEPH MILLIGAN.

Sworn to, and subscribed before me, Nov. 29, 1858.

MICH. F. BOISCLAIR, Not. Pub. R. C. Ga.

The following judgment was pronounced by Judge Holt, on the foregoing motion and exceptions:

The order to enter upon the minutes of the court this award, which has been made and returned in strict conformity to the act under which the submission was made, is resisted on several grounds, which have been argued before the court. The two first may be resolved into one—"mistake of the arbitrators in making their estimate of damages." Is mistake a good ground why the award should not be entered? Fraud, accident, and mistake, are common heads of equity, against which courts will grant relief. And in the rule of reference of the case between the par-

ties on appeal, the only exception that could be taken to the award to be made under the rule, was for fraud, accident, or mistake, and such exception was expressly allowed. But when the submission of the 7th July, 1858, was entered into, the case of the parties, as therein stated, was brought strictly within the provisions of the act under which the submission was made. The 14th section of that act very clearly points out the duty of the court, when the award is regularly returned, which is, that "said award shall be entered upon the minutes of the court." The effect of such entry, and the only means of avoiding that effect, are plainly stated in that section and the following. But whatever steps are taken against the award, must be taken after it has been received and entered upon the minutes of the court. For what cause an award may be attacked, and how set aside, is clearly stated in the 15th and 16th sections of the act. Fraud and corruption of the arbitrators are the only causes allowed by the law; the courts cannot go beyond the law and super-add mistake. There is, however, another ground, on which counsel for defendants rely with much confidence: it is the want of any sufficient cause of action against the defendants, as is (say they) apparent on the face of the record; and that "said plaintiffs in their said action claim damages for what, by their own shewing, is only a public nuisance for which no private action lies." The court does not think the case of the plaintiffs is stated in this ground; neither in the declaration, nor in the submission, are damages claimed by them for a public nuisance, but for private injuries arising from a public nuisance; and there can be no doubt but that for such injuries an action would lie. But whether the claim of plaintiffs to damages were well or ill founded it is unimportant here to inquire. There were certainly matters of controversy, and of a very grave character, between the parties, which they chose to submit to arbitration, and an award being returned

against the defendants, they are not now to be heard in denial of plaintiffs' right of action. If the transaction, which was the foundation of the controversy, was clearly illegal, gambling, for instance, and the submission was as to money won at cards, the award would assuredly be rejected. Courts never lend their aid in such matters. But that is a case as unlike the one before us as two cases can be unlike. It is not unlawful to navigate the Savannah river in steamboats; nor is it unlawful to build a bridge across the Savannah river, at Augusta, having license from the proper authorities. Both are lawful acts, and laudable too, if done in a lawful way. So to build as to obstruct the navigation of the river, is an unlawful act, and wrongful to him who is injured thereby, for which wrong and injury the law gives redress in damages. To obtain such redress, the action was brought and the submission made, and the award must be received and entered on the minutes, and the defendant left to pursue the course prescribed for vacating and setting it aside. The motion is allowed.

To which decision the defendant excepts; and says that said superior court erred therein, in this:

1. That under the rule of reference, and the submission of the case, either fraud, accident, or mistake, was expressly allowed, as a ground of exception to any award; and therefore the defendants could not be restricted to exception for fraud or corruption only.

2. That it was sufficiently shown to the court, by the affidavit of one of the arbitrators, that a mistake had been made in their award, 1st, in allowing damages for prospective profits, and 2d, in making no deduction from
• an estimate on that basis, on account of profits actually realized.

3. That even if the above showing were not complete, so as to decide finally the rights of the parties under the motion, it was at least, sufficient ground for causing the

court to stay any final judgment, till the arbitrators could be fully examined, and the fact of mistake proved or disproved.

4. That on the face of the whole record, including the award, there was nothing on which judgment could be rendered for the plaintiffs; for that, by their own showing, they had been damaged, only by the direct result of a public nuisance, to which all other persons were subjected, and no special and consequential damage to said plaintiffs was alleged.

WM. T. GOULD, and JAS. L. PETIGRU, for plaintiff in error.

MILLERS & JACKSON, and E. STARNES, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

1. The first question made in the record and discussed by counsel is, was this an arbitration under the rule of court, or under the act of 1856; or both?

There was a case pending in court between these parties, and there was a rule of reference made of it by order of the court, with the consent of parties. Subsequently there was an agreement entered into out of court, to submit, not only the matters embraced in the writ, but other matters in dispute not included therein, but germane to them. The agreement to submit provides distinctly, that the arbitration shall be subject to the rule of reference taken in the case, as well as to the terms and provisions of the act of 1856.

Now, the rule of reference expressly declares, that the award may be excepted to for "fraud, accident, or mistake." And yet counsel for the defendants in error insist, and so the court decided, that in as much as the act of 1856, authorizes an award to be excepted to only for fraud or corruption in the arbitrators, that the alleged *mistake*

in this award, is not examinable into. His Honor, the presiding judge, remarks—"But when the submission of the 7th July, 1858," (it should have been the 11th of June, 1858,) "the case of the parties as therein stated, was brought strictly within the provisions of the act under which the submission was made;" meaning the act of 1856. Is this so? and is this conclusion drawn from the fact that the submission was subsequent to the rule of reference? This inference would have been legitimate had the submission failed to adopt the rule of reference and the terms of the law had been repugnant. But instead of this, it recites the pending of the action between these parties, and the order of the court referring the matters in issue to arbitrators; and then stipulates, as we have already stated, that the arbitration shall be "subject to the rule of reference taken in the case." We confess we are unable to see how, under these circumstances, the rule of reference is superseded or abrogated by the submission, although the former be prior in point of time.

The most that can be said is, that the submission, from inadvertence, or some other cause, has presented two contradictory rules to control the arbitration and award. Upon what principle are the defendants in error entitled to the full benefit of the 15th and 16th sections of the act of 1856; and to insist that the award can be attacked only for fraud and corruption according to the 15th; or fraud or corruption according to the 16th section of said act? May not the plaintiffs in error contend with equal plausibility and propriety that the award may be revised for "fraud, accident, or mistake," according to the rule of reference?

It is the duty of the court to harmonize, if possible, these apparently inconsistent stipulations in the submission so as to give effect to every part of it. The terms of the rule of reference itself, if carefully scrutinized, settle this difficulty conclusively. After providing that the award

of the arbitrators shall be final between the parties, no appeal to any court lying therefrom, "except for fraud, accident, or mistake," it was further ordered, "that the parties have leave to be represented by their counsel before the arbitrators; and that the latter be guided by the rules laid down for the regulation of arbitrators in the act of March 5th, 1856."

Here we have a key to unlock the true intent of the parties, when they agreed in the submission that the arbitration shall be subject both to the terms of the act of 1856 and of the rule of reference; they intended that the *arbitrators* should be guided in their proceedings by the act of 1856, examining the parties as witnesses, &c., but imposing no restriction upon the right of either to except to the award for "fraud, accident, or mistake." This we hold to be the obvious and undoubted construction of the submission.

2. Was the alleged mistake inquirable into upon the disclosures made by Joseph Milligan, one of the arbitrators? We do not find it necessary to decide this point, under the further view which we have taken of this case. We will say, however, that we see serious objections against permitting an arbitrator to impeach his award, as well as a juror his verdict, long subsequent to the time when the finding has been rendered. The award in this case, was signed the 7th day of July, 1858; the parties were furnished each with a copy on the 8th, and no complaint is made by the arbitrator until the 15th of that month. Jurors no doubt often become dissatisfied with their verdicts, and courts with their judgments, still they must stand as the law of the case. If the fact be as alleged in Milligan's letter, that the arbitrators awarded to the plaintiffs, a gross amount of possible profits and deducted nothing for the profits shown to have been actually made, the law certainly would provide some way

to enable the defendants to ascertain and correct an error so gross.

3. This brings us to the last and main ground of objection to the award, and that is the want of sufficient cause of action against the defendants, apparent on the face of the record. The plaintiffs in error maintain that the defendants in error claim in their declaration and by the submission damages for what, by their own showing, is only a public nuisance, for which no private action lies.

There is no dispute that the general rule of law is, that a private action will not lie for a public nuisance. It is the subject of indictment, not of action. The reason of the rule is, that it would create a multiplicity of actions; one being as well entitled to bring an action as another; and therefore, in cases of public nuisance, the remedy must be by indictment.—Co. Lit. 56 a.; Roll Abr. 88-110; Moor, 180; 2 Brownl, 147; Vaugh, 341; Cro. Eliz. 644; 3 Mod. 294; Carth. 171; Salk, 15 Pl.; 3 Black. Com. 219; 15 Geo. Rep. 61-62. The declaration and submission set out a public nuisance—the obstruction of a navigable river.

To this general rule there is an exception; namely, that if by such a nuisance, the party suffered a particular damage, as if by stopping up the highway by logs, any horse throws him, by which he is hurt or wounded, an action lies.—Cro. Jac. 446; Keb. 849. Now the point at issue is, do the plaintiffs come within the exception?

In this, as in many other cases, where the general principle has been departed from by engrafting exceptions upon it, the line of demarcation frequently becomes too dim and attenuated to be distinctly visible or clearly stated. We have examined with some care the numerous precedents, English and American, upon this subject; and it is not quite satisfactory to myself to determine on which side the weight of authority preponderates. There is, therefore, a want of entire confidence in the result at

which the court has arrived. The question has received various determinations, according to the circumstances of each case.

In *Pame vs. Patrick*, Carth. 194, it was said by Lord Holt, that if a highway be so stopped, that a man is delayed a little while on his journey by reason whereof, he is damnified or some important affair neglected, that it is not such a special damage for which an action on the case will lie; but that the damage ought to be direct and not consequential as the loss of his horse or some corporal hurt in falling into a trench in the highway.

I will not refer to the case of *Herbert vs. Groves*, 1 Esp. Rep. 148, decided by Lord Kenyon, and a strong case in favor of the defendants. 1st, because the authority of that case has been greatly shaken; and 2dly, because it was adjudged since the Revolution, and consequently, not to be regarded here further than its intrinsic merit demands.

The case of *Chichester vs. Lethbridge*, (Milbs. 71,) appears to be the last adjudged case in England on the subject prior to the Revolution; and is the leading case relied on to uphold the contrary doctrine. It is briefly this: The defendant obstructed the highway by a ditch or gate across the road, by means of which the plaintiff was obliged to go a longer and more difficult way, to and from his close; *and the defendant opposed the plaintiff* in attempting to remove the nuisance. It was held that an action well lay for special damages.

I would remark respecting this case, these two particulars—1st, the plaintiff had a special right to go to and from his close; and 2dly, the defendant in person withstood and opposed him, and prevented him from removing the obstruction, which by law, he might do. The conclusion to which the court has come is this: That so far as the case stated in the original declaration is concerned, if supported by proof, it is justified by some of

the cases to be found in the Books, to-wit, that the steam-boat Fashion, owned by the plaintiffs as common carriers, was proceeding in and upon and along the Savannah river, with divers, goods, wares and merchandize, to be conveyed thereon from Augusta to Savannah; yet the S. C. R. R. Company, intending to injure the plaintiffs, and to deprive them of the use and benefit of said navigable stream, &c., whilst said boat was proceeding upon said river, &c., by reason of a bridge unlawfully constructed across said stream, obstructed said boat, &c., and stopped it for a long space of time, viz: for the space of ten days, &c., whereby the plaintiffs were damaged ten thousand dollars.

The truth of this averment is hardly conceivable; still, as we are deciding the case upon the declaration, we must assume it to be true. The balance of the plaintiffs demand as set forth in the writ, and the submission, is not so stated as to entitle them to any recovery. I confess I cannot exclude from my mind the conviction, that from the very nature of the pleadings, it is apparent the gravamen of the plaintiffs' claim, is for possible, prospective and speculative profits. What then shall we do with the award? It is for the sum of \$29,992 77. May we infer that the whole of this amount was allowed under that part of the declaration which we admit to be good? This we cannot do; for it is near \$20,000 more than they claimed for that injury. They laid their damages under the original writ for only \$10,000. Is it a case where we could pronounce a judgment setting aside the award, unless the plaintiffs would write off the \$20,000 excess? This is a discretionary power which the courts may and frequently do exercise. But we are satisfied it would not meet out the full measure of justice in this case. The jury only found \$2,000 under the original declaration, and the defendants appealed from that verdict.

Upon the whole, we think it best to set aside the award

altogether, and remit the case back to be re-instated in the court below, to be tried under the first count, as restricted in this opinion, as to the damages resulting from the actual detention of the plaintiffs' boat *Fashion*, when in a course of navigation from Augusta to Savannah, by reason of the erection of this structure.

4. Has the court the power to review and set aside this award on account of the mistake in law, made by the arbitrators?

Here again there is a conflict of authority, because the courts have not said and stood to it that awards might or might not be examined into on account of the misconception of the law by the arbitrators. Upon one point there is a good degree of unanimity, namely, that if the award be clearly against law, and that fact appears upon its face, the court will interfere.—See 18 C. L. R. 200, note *a*, and the cases there cited.

That is the case. We decide the law of the case upon the face of the writ and the submission. Take the old example by way of illustration: A sues B for slander in charging him with stealing water from the town spring. The case is submitted to arbitrators; and they award damages to A. Would the courts suffer such an award to stand? Would they enforce it by a judgment? We apprehend not. This is that case, if we are right in our opinion of the law.

5. As to the preliminary motion to dismiss this writ of error, because the counsel for the defendants in error were not made parties to it, we hold that they were not necessary parties to this proceeding. They were not parties, either to the writ or the submission. It is true, that by agreement between the parties from the amount found for the plaintiffs was to be deducted the fees due their counsel, which were to be paid by the defendants directly to the attorneys. The rights of counsel do not arise until some sum is finally awarded to their clients.

Epping vs. Devanny.

And in that event there is no contest between them and the plaintiffs in error. They have been served with notice and are actually representing this case in the only legitimate way in which they are entitled to be heard; and that is, as counsel to sustain the award made in favor of their clients.

Judgment reversed.

EPPING vs. DEVANNY.

J. D. leased to C. E. a lot in the city of Savannah, for the term of three years, at an annual rent of \$800, "*upon condition that the said J. D. should, on or before the 1st day of October next, have the main dwelling house and all the out-houses, (including servants' rooms,) on said lot put in complete tenantable order and condition, and will, on or before the last mentioned day, have the garden lot, in front of said main dwelling house, properly laid out and inclosed with iron railing, it being understood and agreed that the payment of rent is not to commence until all the said work is finished, and it being optional with said C. E. to abandon and give up said lease, if the said work shall not be completed within three months after the said first day of October next.*"

It was further agreed between the parties, that "should the said C. E. be evicted from the premises during the lease, without fault on his part, that the *rent* should cease and determine; and further, that the payment of rent should also cease whenever the premises should become untenable from fire or any other casualty, without the fault of the said C. E.

Held, that under this contract no rent accrued until all the work was completed.

Complaint for rent—in Chatham Superior Court. Tried before Judge FLEMING, at May Term, 1858.

This was an action by John Devanny, administrator of John Doyle, deceased, against Carl Epping, for the recov-

ery of rent for a house and lot in the city of Savannah, for the term of three years, at eight hundred dollars per annum.

The facts of the case are fully set out in the bill of exceptions, which was as follows :

State of Georgia, } Be it remembered, that in a
Chatham County. } case pending in the Superior
Court of Chatham county, in which John Devanny, ad-
ministrator of John Doyle, deceased, was plaintiff, and
Carl Epping was defendant, a special verdict was rendered,
on the twenty-ninth day of May, A. D., as follows :

John Devanny, }
Adm'r of John Doyle, }
vs. } Chatham Superior Court.
Carl Epping. }

We, the Jury, find that on the 23d day of July, 1852, the following lease was executed between John Doyle, the intestate of the plaintiff, and the defendant :

State of Georgia, } This Indenture, made this 23d
City of Savannah. } day of July, in the year eighteen
hundred and fifty-two, between John Doyle, of the city
and State aforesaid, of the one part, and Carl Epping, of
the same place, of the other part, *Witnesseth*, That the
said John Doyle, for and in consideration of the yearly
rents and covenants hereinafter mentioned, and reserved
on the part and behalf of the said Carl Epping, his execu-
tors and administrators and assigns, to be paid, kept and
performed, hath demised, set and to farm let, and by these
presents doth demise, set and to farm let unto the said
Carl Epping, his executors, administrators and assigns,
all that lot of ground situate, lying in the city of Savan-
nah, bounded on the north by Harris street, on the east
by Lincoln street, on the south by Macon street, and on
the west fronting on Lafayette square, said lot being in
Lafayette ward, opposite to the residence of Octavus Co-
hen, Esquire.

Together with all and singular the buildings, out-build-

ings, improvements, rights, privileges, members, premises and appurtenances thereunto belonging, or in anywise appertaining. *To have and to hold* the said lot of ground, and all and singular the houses, out-houses, improvements and premises hereby demised, with the appurtenances, unto the said Carl Epping, his executors, administrators and assigns, from the first day of October next ensuing the date hereof, for and during the term of three years next thence ensuing, and fully to be complete and ended; yielding and paying unto the said John Doyle, his executors and administrators, the yearly rent or sum of eight hundred dollars, in four equal quarterly payments of two hundred dollars each; and the said Carl Epping, for himself, his heirs, executors and administrators, doth covenant, promise and agree to, and with the said John Doyle, his heirs, executors, administrators and assigns, that he, the said Carl Epping, his heirs, executors and administrators, or some of them, shall and will well and truly pay, or cause to be paid, unto the said John Doyle, his heirs, executors, administrators or assigns, the said yearly rent of eight hundred dollars, hereby reserved on the several days and times hereinbefore mentioned and appointed for the payment thereof, according to the true intent and meaning of these presents.

Upon condition, nevertheless, that the said John Doyle, his executors, administrators or assigns, shall, on or before the said first day of October next, have the main dwelling house and all the out-houses (including servants' rooms) on said lot put in complete tenantable order and condition, and will, on or before the said last mentioned day, have the garden-lot, in front of said main dwelling house, properly laid out and enclosed with iron railing, it being understood and agreed that the payment of rent is not to commence until all the said work shall be finished; and it being optional with the said Carl Epping, his heirs, executors, administrators or assigns, to abandon and give

up this lease, if the said work shall not be completed within three months after the said first day of October next.

And it is further covenanted and agreed, by and between the parties to these presents, that in case of the eviction or ouster of the said Carl Epping, his heirs, executors, administrators or assigns, from the said lot and premises, or any part thereof, during the said term of three years, without the fault of him or them, then and from thence the said rent shall cease and determine; and further, that the payment of rent shall also cease whenever the said premises shall become untenable (during the said term) from fire, or tempest, or any casualty beyond the control and without the fault of the said Carl Epping, his heirs, executors, administrators or assigns; and the said John Doyle for himself, his heirs, executors, administrators and assigns, doth covenant, promise, grant, and agree to, and with the said Carl Epping, his executors, administrators and assigns, by these presents, to do and perform all and singular the covenants and things on his, the said John Doyle's part and behalf, to be done and performed as hereinbefore stated; and further, that he and they will, during the term aforesaid, suffer and permit the said Carl Epping, his executors, administrators and assigns, peaceably to have, hold, use, occupy and enjoy the said premises, without the eviction, hindrance or molestation of any person whatsoever, on the regular payment of rent as aforesaid, during the said term, by the said Carl Epping, his heirs, executors, administrators or assigns.

In witness whereof, the said parties have hereto set their hands and seals, the day and year first above written.

JOHN DOYLE, [L.S.]

CARL EPPING, [L.S.]

Witness:

JAMES JOHNSTON, }
J. N. HUDTWALCKER. }

And we further find that the defendant occupied the premises during the term therein specified, but that the said John Doyle did not have the main dwelling house and all the out-houses, including servants' rooms on said lot, put in complete tenantable order and condition, nor have the garden lot in front of said main dwelling house properly laid out and enclosed with iron railing, until the 14th day of January, 1854. And we find that the defendant has made the payments and advances claimed in the schedule to his plea attached. Upon this state of facts, if the Court should be of opinion that the rent did not commence to run until the 14th day of January, 1854, when all the conditions were complied with, we find for the defendant, with costs of suit; but if the Court should be of the opinion that the suspension of the rent, though the conditions were not complied with, was limited to the three months specified in the lease, after which it was optional with the defendant to give up the house, then we find for the plaintiff the sum of five hundred and ninety-eight 22-100 dollars, with interest from the 14th day of January, 1854, and costs of suit; and judgment to be entered by either party as of this term.

W. H. DAVIS, Foreman.

29th May, 1858.

The above to be argued before the Judge, upon five days' notice by either party, with leave to allow either party to carry the case to the Supreme Court.

And afterwards, to-wit: on the day of December, A. D. 1858, after hearing argument at Chambers, upon the points submitted, by said Special Verdict, to the Honorable William B. Fleming, Judge of the Superior Courts of the Eastern District of Georgia, His Honor rendered and filed his decision in writing, in the following words and figures:

Decision of Judge FLEMING:

The question presented for my decision, and which is

made by the special verdict, is: From what time does rent commence under the terms and stipulations of the lease?

This question arises upon the following clause in the lease:

"Upon condition, nevertheless, that the said John Doyle, his executors, administrators or assigns, shall, on or before the said first day of October next, have the main dwelling house and all the out-houses (including servants' rooms) on said lot put in complete tenatable order and condition, and will, on or before the said last mentioned day, have the garden lot in front of said main dwelling house properly laid out and enclosed with iron railing; *it being understood and agreed that the payment of rent is not to commence until all the said work shall be finished; and it being optional with the said Carl Epping, his heirs, executors, administrators or assigns, to abandon and give up this lease, if the said work shall not be completed within three months after the said first day of October next.*"

The maxims for the exposition of contracts are simple and consistent, and well calculated to effect their sole object, namely, *to do justice* to the parties by enforcing a performance of their agreement *according to the sense* in which they mutually understood it at the time it was made.—*Chitty, Jun'r, 19.*

To ascertain the sense in which the parties mutually understood the contract at the time it was made, "the construction must be upon the *entire instrument, and not merely upon disjointed parts*. It is a part of the same rule, that *every portion* of an agreement shall, if possible, be brought forward in collecting the *intention* of the parties." Let us apply these principles to the contract before me. The contract must be construed so as *to do justice* to the parties. How is this justice to be done? By enforcing the agreement according to *the sense* in which the parties mutually understood it. How shall we arrive at their

understanding of the agreement? By bringing forward every *portion* of the agreement and construing the *entire instrument*, and not confining ourselves to *disjointed parts*.

In this lease, it is stipulated that the premises shall be in complete tenantable order and condition on or before the first of October (then next), and that rent is not to be paid until the work is finished; but it is also stipulated that if the work is not finished within three months after the said first day of October, it shall be optional with Carl Epping to abandon and give up the lease. According to one of the rules laid down, these stipulations must be construed *together*, if we would ascertain the *intention* of the parties. Taking them together, what was the understanding of the parties?

The understanding and intention of the parties, it seems to me, was this: 1st. That the work was to be finished by the first of October. 2d, If not finished by the first of October, rent was not to commence at that time; but if finished within three months from that time, rent was to commence from the time it was finished. 3d, If not finished within three months from that time, it was to be optional with Epping to abandon and give up the lease, which is the same thing as leaving it optional with him whether he will *occupy under the lease*, although the work be unfinished. If he occupies, *he must occupy under the lease*. He may not abandon the lease as to *his own covenants* in it, and adhere to it as to the covenants of Doyle. His covenant is to pay rent, and it is only by performing *his own covenants* that he is in a position to assert his claim for damages against Doyle for not performing his. Will it be said that his covenant in the lease is to pay rent when *the work is finished*? This would be to construe the *whole instrument*, by giving it a meaning which is true only of a disjointed part of it. Take the whole together, and the construction I have given, it seems to me, is the true one. That construction may be generally stated thus: If the

work is finished within three months from the first of October, Epping is bound to pay rent from the time it is finished, *whether he occupies or not*. If it is not finished within three months from the first of October, it is optional with him whether he pays rent—that fact depending upon the exercise of the option given him in the lease to *abandon* it or *occupy* under it.

It is therefore ordered, That judgment be entered upon the verdict for the plaintiff, for the sum therein specified, and as required by said special verdict.

W. B. FLEMING, Judge E. D., Geo.

Whereupon, counsel for the defendant tender this, the said defendant's bill of exceptions, and say—

1st, That the said Judge erred in the construction of the said lease, referred to in his decision.

2d, That said Judge erred in ordering that judgment be entered up for the plaintiff, for the amount named in said special verdict.

HARDEN & LAWTON, for plaintiff in error.

LLOYD & OWENS, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

The only question in this case is, can a person protect himself by a special contract?

It is axiomatic that the intention of parties to a contract clearly expressed, is the law of the contract. *Modus et conventio vincunt legem*. Brown's Legal Maxims, 538.—Chitty on Contracts, 87. Here it was not only the expressed intention of the parties, that rent was not to be paid until the premises were finished, but the completion of the work was made a *condition precedent* to the right to demand rent, and therefore no rent was due, or could be recovered, until performance of the condition was shown. 3 Vermont Rep., 339.

The liability to pay rent was not only "*upon condition*" that the house should be "put in complete tenantable order and condition," but it was expressly "understood and agreed that the payment of rent is not to commence until the said work shall be finished." Now, if the agreement to finish the work and to pay rent were mere covenants, as distinguishable from conditions, still the covenant to pay is dependent upon the covenant to finish.—1 Peter's Rep., 455.

It is contended that Epping is bound to pay the rent, because he did not give up the premises at the end of the first three months. This is *non sequitur*.

1st, Because the option to abandon and give up the lease, provided the work was not completed at the end of three months, was personal to Epping, and in no way affected the condition, which the lessor imposed on himself to finish the work; and,

2d, Because the option to give up the lease only gave the lessee power to give up or surrender an estate—a term of years—so as not to be liable for rent at all, though the work should be finished at some subsequent period; and that option having been inserted for his benefit, its non-exercise cannot surely put him in a worse condition than he was before. To save himself from the payment of any rent, he must have given up his term; but it does not thence follow that rent is due before the work is finished.

Suppose the agreement in this case did not make the completion of the work a condition precedent to the payment of rent; and suppose, moreover, that the covenant to pay was not dependent upon the covenant to finish, and that each party were to sue the other for a breach of his covenant, it is not pretended that Doyle could recover of Epping more than the amount of rent which he stipulated to pay. Indeed, counsel do not claim that Epping should be made chargeable for the full consideration for unfinished premises. Would not Epping be entitled to

recover the full amount of rent which he agreed to give for finished premises, as *stipulated damages*? In this view of the case, we think it clear for the plaintiff in error.

The only trouble the Court has had in interpreting this contract, is one not insisted upon by counsel, and it is this: What is meant by the words "that the payment of rent is not to commence until all the said work shall be finished?" Was it the understanding of the parties that no rent was to accrue till then, or only that the payment was suspended? Upon the construction of the language used, taken by itself, we should hold that the former was the true intent of the instrument; but by reference to similar phraseology in the latter part of the lease, all doubts are removed upon the subject. It was agreed between the parties, that in case of eviction or ouster of the lessee, without fault on his part, "then and from thence the said rent shall cease and determine." And again, and immediately after, it is provided further "that the *payment of rent* shall also cease whenever said premises shall become untenable," thus showing that "rent" itself, and "the payment of rent" are employed in the contract as convertible terms.

Our conclusion, therefore, and judgment, is, that no rent accrued, or was owing under this contract, until the premises were completed.

Judgment reversed.

COLE vs. REILLY & McMAHON.

A replevying bond in attachment, conditioned that the defendant shall appear, and *abide by and perform* the judgment in the attachment; binds him not only to appear, but also to *pay the judgment*, if judgment goes against him.

Suit on appearance bond, in attachment. In Chatham Superior Court. Decision on demurrer, by Judge FLEMING, at January Term, 1859.

Williams & Ratcliff sued out an attachment against John Reilly, returnable to the Superior Court of Chatham county, which was levied by Cole, sheriff of said county, on a grocery store occupied by Reilly, and the stock of goods therein, as the property of defendant; whereupon Reilly executed to the sheriff a bond, with McMahon as his security, conditioned "that if the said John Reilly should well and truly *appear* before the Superior Court of Chatham county, to which said attachment was returnable, and should then and there *abide by and perform* the order and judgment of said Court, touching said attachment, then said obligation to be void and of no effect, otherwise to remain in full force and virtue." Afterwards plaintiffs in attachment recovered judgment against Reilly for \$575 damages, and \$26 for cost. The plaintiff's declaration alleged the foregoing facts, and further averred that Reilly, although often requested, had not paid said judgment, nor in any manner performed the same, but wholly refused and neglected so to do, by reason of which said breach the said bond had become forfeited, and an action had accrued to plaintiff, &c.

To this declaration defendants demurred, and Judge Fleming, before whom the cause was heard, after argument sustained the demurrer.

To which decision plaintiff, by his counsel, excepted, and assigns the same as error, on the following grounds:

1. Because the Court erred in deciding that the bond, executed by the defendants, and upon which suit is brought, was an ordinary bail bond.

2. Because the Court erred in holding that the condition of said bond was performed by the *appearance* of defendant, without satisfying the judgment.

3. Because the Court erred in sustaining the demurrer.

NORWOOD, WILSON & LESTER, for plaintiff in error.

LAW, BARTOW & LOVEL, *contra*.

By the Court.—BENNING, J., delivering the opinion.

Was the Court below right in sustaining the demurrer to the declaration? We think not.

The declaration was founded on a bond given in compliance with the part of the attachment act of 1799, which is in the following words: "And all goods, chattels, lands and tenements, subject to such attachments, shall be replevable by appearance and putting in special bail, or by the defendant's giving bond, with good and sufficient security, to the sheriff or other officer serving the same, which bond he is hereby empowered to take, compelling the defendants to appear at the Court to which such attachments shall be returnable, and to abide by and perform the order and judgment of such Court." Cobb, 71. The defendant in this attachment, Reilly, failed to pay the judgment rendered against him in the attachment, and the question is, whether that was a breach of the condition of the bond.

The condition of the bond was in pursuance of the act; it was, to appear at the return term of the attachment, and to abide by and perform the judgment of the Court, touching the attachment. The meaning of the words "abide by and perform the judgment" cannot be less than this, that he was to *pay* the judgment, for the judgment was to be one for so much money, and the only way to perform such a judgment is to pay it.

The amendatory attachment act of 1816, in providing for the giving of such a bond as this, in the case of attachments for debts not due, uses the very words, "pay the money;" it says, "but the defendant may relieve his property by giving to the creditor good security to pay the money when due, and cost." *Ib.*, 75.

This act being in *pari materia* with the other, and expressly saying that the bond is to be conditioned, "to pay the money" is sufficient to remove any doubt, if any were left, that the words in the act "to abide by and perform the judgment" meant the same thing—meant, "to pay the money" recovered in the judgment.

What is there to be urged against this view? Two things were urged. First, it was said that if the meaning was, that the defendant was to be bound to pay the money, what was the use of also binding him to appear? Grant that there was none. That would merely show, that the binding him to appear was superfluous, was useless, but that a certain construction will render some words of an act superfluous, is not sufficient to forbid that construction, if it is one plainly called for by the other words of the act, and that call is supported by the express words of an act in *pari materia*.

But, indeed, there may have been in the mind of the Legislature a supposed use for an appearance by the defendant. By the common law, the plaintiff in an action could not get a judgment against the defendant, until appearance or outlawry of the defendant. Hence, by the common law, appearance by the defendant was valuable to the plaintiff. At the time when this attachment act was passed (1799) the change of the common law in this respect was but recent, and, perhaps, not generally known. Consequently, it may be that the Legislature acted under the impression that that law was, in this respect, still in force, and that they required an appearance at the first term of the attachment to meet this supposed law.

Again, this argument may be retorted, and thus neutralized. If the only object of the Legislature was to compel an appearance by the defendant, what was the use of saying that he should "abide by and perform the judgment."

Bealle vs. Day.

tly, a mere appearance "at the Court to which" the attachment is "returnable," would be a poor substitute for the replevied property, and yet, that is all the protection the plaintiff would have, if the words "to abide and perform the order and judgment of" the Court, have no effect.

The next argument was, that there was a case in *Dud*-reports, (35,) in which it was determined that a writ of this sort is satisfied by the mere appearance of the defendant in attachment. But the point in that case was whether the taking of such a bond dissolved the attachment, so as to relieve the officer from the duty of enforcing the attachment, &c. There was no question in that case as to the import of the condition of the bond. Of course, any general words that may have been used by the Court are to be restricted to the facts of the case.

We think, then, that the declaration was sufficient, and therefore, that the Court below erred in sustaining the demurrer to it.

Judgment reversed.

BEALLE vs. DAY.

The plaintiff amended his declaration by substituting another person for himself. This amendment was struck out, on the objection of the defendant.

That the effect was to restore the case to its first condition, and that the purpose was to make him become the plaintiff again.

The argument drawn from matter not contained in the record, must be disregarded.

By *scire facias* to make a party plaintiff, the defendant pleaded a plea in abatement by the previous plaintiff, and a "settlement" with the previ-

Bealle vs. Day.

ous plaintiff. The Court declined to divide these pleas, but saved them for a defence to the defendant on the trial of the action. *Held*, that this action ought not to be disturbed.

Scire Facias, to make parties. In Richmond Superior Court. Decision by Judge HOLT, at November Term, 1858.

The facts of this case are as follows:

Oswell E. Cashin, appointed administrator of Gazaway F. M. Bealle, deceased, as and while Clerk of the Superior Court of Richmond county, instituted his action of trover against Charles T. Bealle, for the recovery of three negroes, returnable to June term, 1853, of Richmond Superior Court. Afterwards, at June term, 1856, Benjamin F. Hall, having succeeded Cashin in office, applied for and obtained letters of administration *de bonis non* on the estate of said Gazaway, and, on motion of counsel for plaintiff, the declaration was amended by making Hall a party plaintiff in said action, in the place and stead of Cashin. Subsequently the Court of Ordinary of Richmond county revoked the letters of administration both of Cashin and Hall, and, upon application therefor, appointed Richard H. P. Day administrator *de bonis non* on said estate; whereupon Day sued out Scire Facias, calling on defendant to shew cause why he, as administrator *de bonis non* of Gazaway F. M. Bealle, deceased, should not be made a party plaintiff in said cause, in lieu and stead of Oswell E. Cashin. Defendant appeared by counsel and shewed for cause—

1st. That there was no such record as that set forth in the *Scire facias*.

2d. That the plaintiff in the original suit, Cashin, came into Court, and voluntarily retracted his action, prior to the issuing of said *Scire facias*.

3d. Prior to said retraxit, the parties to the original suit met and agreed upon a settlement thereof, and then

ere did settle the case, and the plaintiff expressed himself as satisfied. And

That the said Cashin had not been removed from administration of the estate of the deceased, and that said H. P. Day was not such administrator as he assumed himself to be.

On argument, the Court held and decided that the third and fourth grounds in the answer were insufficient, and ordered parties to be made, reserving to the defendant the right, upon the trial of the cause, of insisting on the matters of defence contained in the second and third grounds.

Which decision and judgment counsel for defendant assented to, and assigns the same as error.

WILLIAMS & JACKSON, J. C. & G. SNEAD, E. STARNES, for plaintiff in error.

DONE, *contra*.

the Court.—BENNING, J., delivering the opinion.

The Court below overruled the first and fourth pleas, and postponed the second and third, to the trial of the cause.

Was this decision right?

The first plea was: "That there was no such record as set forth in said *scire facias*."

The record "set forth" in the *Sci. fa.*, was the record in which Oswell E. Cashin, as administrator of the estate of P. M. Bealle was the plaintiff, and Charles T. Day was the defendant. It was argued that Cashin, some time before the issuing of the *Sci. fa.*, "on motion of his own counsel, had retired from the case," and that Hall had, thereupon, been made a party in his place. That the record shows is, that Cashin "amended the petition in said case, by making" "Hall a party plaintiff therein," in his place; and, that this amendment was

excepted to; and, that the exception was sustained by the Court. The amendment, then, being nullified, the case stood as it did before the amendment was made, and it stood, before that was made, as a case in favor of Cashin, adm'r of Bealle vs. Bealle.

There *was*, then, such a record as that set forth in the *Sci. fa.*, viz: a record in which Cashin was the plaintiff. This first plea was, therefore, not true, and, consequently, the judgment overruling it was right.

The fourth plea was, that Cashin had not been removed from the administration of the estate of Bealle, and that Day was not administrator of that estate.

The argument urged against the judgment overruling this plea was stated in these words: "The evidence, if plaintiff had been required, or defendant had been permitted to produce any, would have been the judgment of the Court of Ordinary, revoking and annulling the administration of Cashin, because he had never given any bond as administrator. His administration was, therefore, void." But there are no facts in the record for this argument to rest on. There is nothing in this record to show that the plaintiff ever offered in evidence the judgment referred to in the argument; nothing in the record to show that any such judgment exists. We, therefore, cannot yield to the argument. But, indeed, we are not ready to say that we should yield to this argument if it did appear that this judgment exists.

We merely say, however, that, with "the lights before us," we are not able to see any error in the judgment overruling this, the fourth plea.

The Court made no decision on the second and third pleas. It refused to make any decision on them, but saved to Bealle the right to insist on the matters contained in them, on the trial of the case. And where there is no decision, there can be no case for this Court. The words of the act organizing the Court are: "All causes

iminal or civil nature may, for alleged error, in any n, sentence, judgment or decree, be carried up," Cobb, 448.

indeed, the matters of these pleas are very proper, efence to the action, and we can see little reason he defendant in the action should not be content to himself of them in his defence to the action. And y any means clear that such matters as these are ble to a *scire facias*" to make parties? If so, are ilure of consideration, *non est factum*, payment, the e of limitations, every defensive matter, equally ble?

Upon the whole, we decline to interfere with the of the Court on the second and third pleas.

Judgment affirmed.

BROWN vs. THE STATE.

trial ought to be granted where one of the jury is cousin to the secutor, and the fact not known to the accused or his counsel after his conviction.

dictment for Forgery and Counterfeiting. Motion ew trial. In Chatham Superior Court. Tried be- Judge FLEMING, at January Term, 1859.

ie facts of this case will be found sufficiently stated ie bill of exceptions, which was as follows, viz :

ie of Georgia, } Be it remembered, that at the
 Chatham County, } January Term, 1859, of Chatham
 erior Court, his Honor William B. Fleming, one of
 Judges of the Superior Courts of said State, presiding,
 cause of *The State of Georgia vs. William M. Brown*,

then and there pending on the criminal side of said Court, being a prosecution for *Forgery and Counterfeiting*, came on to be heard on the 19th day of February, 1859. The parties announced themselves ready; a jury was empannelled; and the cause went to trial under plea of the General Issue.

Witnesses were introduced by the State only, and testified on the direct and cross-examination as shown by the Record, to be sent up by the clerk of said Court.

In the direct examination of the witness, Benjamin Bragg, defendant, by his counsel, objected to his giving any testimony touching the *uttering* of the instrument alleged to have been forged, on the ground that the third count of the Indictment, that by which it was intended to charge the prisoner with the offence of *uttering a forged instrument of writing, knowing it to be such*, did not charge the defendant, William M. Brown, but William M. Davis, with *guilty knowledge*. The Court overruled the objection, and witness testified as stated in the Record. The defendant then excepted to such decision, and now assigns the same as error.

Defendant introduced no testimony.

The cause was then argued and submitted, and the jury found the prisoner guilty on the third count of the Indictment.

Afterwards, to-wit, on the 25th day of February, 1859, and during the session of said Court at the term thereof aforesaid, the defendant, by his counsel, moved the granting of a *rule nisi*, calling upon the Solicitor General, Julian Hartridge, Esqr., to show cause, *instantly*, or upon a day prior to the adjournment of the aforesaid term of Court, why the verdict of the jury, as aforesaid, should not be set aside, and a new trial granted in said cause, on the following grounds, to-wit :

1. Because the Court erred in admitting evidence going to show the defendant had uttered a forged paper, as the

ent did not allege that he knew the same to be a

cause the juror, Allen Russell, is a cousin of the
or, Henry Davis, a fact not known to the defend-
is counsel till after the verdict was rendered, and
, therefore, an impartial juror as between the
d the accused.

cause the verdict was without evidence.

cause the verdict was contrary to law.

stain the second ground as above stated, counsel
d introduced the original affidavits, copies of
ere annexed to the bill of exceptions.

Court overruled the motion for a new trial, and
nt excepted.

EL & ANDERSON, for plaintiff in error.

AN HARTRIDGE, Sol. Gen., *contra*.

e Court.—STEPHENS, J., delivering the opinion.

main question in this case is, whether or not a new
ght to have been granted on account of the rela-
p of the juror, Russell, to the prosecutor, the fact
ng known to the accused, nor to his counsel, till
onviction. There is no question whether the rela-
p disqualifies the juror. That is conceded, but it
there was no *diligence* used to find out the fact at
ht time. It is said that the act of 1856, page 230
pamp't, 1855 and 1856, provides a time when the
l may ascertain causes of disqualification, and if
s to do so at that time, he fails in that diligence
would entitle him to a new trial. We do not think
single view will show to what consequences such
on of diligence would lead. There are other dis-
ting causes, the imputation of which would be very
ve, such as idiocy or lunacy, or negro blood, and

there is the very same provision for ascertaining these causes at the very same stage of the proceedings. The provision is, that *objection* may be made to a juror on any of these grounds. Now, to come up to the standard of diligence claimed by the Solicitor General in this case, the accused would in every case have to object to every juror on all these grounds, idiocy and negro blood included, for if he should afterwards find out that one of the jurors had negro blood, or was an idiot, he could, as in the case of relationship, be answered that his time had passed. That is to say, the accused, in order to be duly diligent, must of necessity give offence to every juror who is to try his life or liberty, a degree and energy of diligence which we cannot require. He must make the objection at the right time, if he knows the fact, but if he does not know the fact, nor have special reason to believe it, he is not bound to offend every man on the panel by making random imputations against him.

Judgment reversed.

BREWTON vs. SMITH AND WIFE.

1. A deed, though void, may be a cloud over the true title ; and, therefore, a bill will lie, to have it delivered up to be cancelled.
2. K. made a deed in which he said, "I give and bequeath the aforesaid slaves to the said Ebaline Sikes and any other child or children which I may hereafter have." K. had children born afterwards. These filed a bill, and prayed that the deed might be so reformed as to make it convey their interest to a *trustee* for them,—alleging, in the bill, that such trustee was left out of the deed, by ignorance of law in the donor or his scrivener. *Held*, That the bill lay.

quity, in Tatnall Superior Court. Decision on
r by Judge FLEMING, May, 1859.

was a bill filed by Benjamin Brewton as the ad-
tor, *cum testamento annexo*, of Edward Kennedy,
l, late of Tatnall county, and as the next friend of
nt children of deceased, against William Smith
line, his wife. The object of the bill was to en-
action at law and to reform certain deeds executed
aid Edward Kennedy in his lifetime.

ill alleges that plaintiff departed this life possessed
nsiderable property, consisting of land and negroes,
his last will and testament; that the persons there-
inted executors refusing to qualify, complainant
ointed administrator with the will annexed, and
ossession of the estate. That he took possession
ollowing negroes of which deceased died possessed,

Ann and Lydia and their children, and others,
at an action of trover has been instituted against

Smith and wife for the recovery of the first named
s, to-wit, Ann and Lydia and their children. That
and wife claim said negroes under the following
which, they allege, were executed by said Edward
dy at the times they respectively bear date, viz:

of Georgia, } *To all whom these presents shall come,*
all County, } *Greeting:*

Edward Kennedy, sen., of the county and State afore-
or and in consideration of the good will and affec-
which I have to my illegitimate daughter Ebaline
of the age of one year and five or six months old,
given, and by these presents doth give and bequeath
; the said Ebaline Sikes, a certain negro woman
l Ann, and her child Lydia, and all her increase, I
nd bequeath the aforesaid slaves to the said Ebaline
and any other child or children which I may here-
have by my wife Charlotte Kennedy; and I do fur-

Brewton vs. Smith and Wife.

ther give unto the said Ebaline Sikes, one bed and furniture to herself alone, to the only proper use and benefit of them, the said Ebaline Sikes and the other heirs which I may hereafter have by my present wife, Charlotte Kennedy, their heirs, executors and administrators forever. In testimony whereof, I, the said Edward Kennedy, hath hereunto set my hand and seal, this twenty-third day of July, in the year of our Lord eighteen hundred and thirty-eight.

his

EDWARD ✕ KENNEDY, [L.S.]

mark.

Signed and acknowledged in the presence of us.

SHADRICK HANDCOCK.

WM. W. TIPPINS, J. P.

State of Georgia, } *To all whom these presents shall come,*
 Tatnall County. } *Greeting:*

I, Edward Kennedy, sen., of the county and State aforesaid, for and in consideration of the good will and affection which I have to my illegitimate daughter Ebaline Sikes, about four years old, and my daughter Dica Kennedy, about two years and six months old, and my son Alford Kennedy, about fifteen months old, and any other children which I may have by my present wife, Charlotte Kennedy, hath given, and by these presents doth give and bequeath to them, the said Ebaline, Dica, and Alford, and any other children I may have by my present wife, Charlotte Kennedy, in equal interest, (a certain lot of money, to-wit: five hundred and fifty dollars, placed in the place of) a certain negro girl named Harriet, about fifteen years old, and her increase, if any, and one-half of my stock of horses and cattle, and stock of all description, and household and kitchen furniture, and working tools which may be left at my death, to be divided at my death; if I should live until my sons Eli and Hampton

arrive to the age of twenty-one years, and if I should my sons Eli and Hampton should arrive at the age of one years, as I have left the other part of my stock and household furniture to them, to have and to hold the negro girl Harriet and her issue, and the said stock, old and kitchen furniture and working tools, to my proper use, benefit and behoof of them, the said Sikes, Dica Kennedy and Alford Kennedy, and their children which I may have by my present wife, the Kennedy, their heirs, executors or administrators. In testimony whereof, I the said Edward Kennedy, sen., hath hereunto set my hand and seal, this fifth day of March, in the year of our Lord eighteen hundred and forty-one.

his

EDWARD KENNEDY, [L.S.]

mark.

and acknowledged in the presence of us.

GEORGE M. E. TIPPINS.

WM. W. TIPPINS, J. I. C.

Know all men by these presents, that I, Edward Kennedy, of said County, for and in consideration of the natural love and affection which I have and bear to my several children, viz: Ebaline Sikes, my illegitimate daughter, Kennedy, Alford Kennedy, Cynthia Kennedy, Charles Kennedy, Raiford Kennedy, Mahala Kennedy, Mary Kennedy, and Sarah Kennedy, and also any other children which I may hereafter have, by my present wife Charlotte Kennedy, all of the same place, do these presents give and grant, unto my said children, a certain negro woman named Hannah, about fifteen years old, to have and to hold the said negro woman to the said children as aforesaid, their heirs and assigns forever. In testimony whereof, I have hereunto set my

Brewton vs. Smith and Wife.

hand and affixed my seal, this eleventh day of June, one thousand eight hundred and forty-nine.

his

EDWARD ✕ KENNEDY, [L.S.]

mark.

Signed, sealed and delivered in presence of us.

MICHAEL M. EASON.

JOSIAH P. R. SIKES.

DANIEL SIKES.

Georgia, } In person appeared before me Samuel D. Surrency, a Justice of the Peace, in and for said county, Michael M. Eason, who being duly sworn, saith he saw Edward Kennedy sign the within deed, for the purposes therein mentioned; and further saith he saw Josiah P. R. Sikes and Daniel Sikes sign it also as witnesses.

M. M. EASON.

Sworn to and subscribed before me, this 3d September, 1849.

SAMUEL D. SURRENCY, J. P.

The bill further alleges, that at the time the first deed purports to have been executed, Edward Kennedy had no legitimate child or children, but had only an illegitimate daughter, Ebaline Sikes, now Mrs. Smith, mentioned in said deed. That when the second deed was made Kennedy had two legitimate children, Dica and Alford, and at the time the third and last deed was executed, he had the following legitimate children, being, to-wit; Dica, Alford, Cynthia, Charlotte, Raymond, Mohala, Martin, and Sarah; and afterwards he had another child, Caroline; and that all of said children survived their father. That William Smith intermarried with the said Ebaline, the illegitimate daughter mentioned and provided for in said deeds, and claims under the *first* deed all the negroes therein mentioned, with their increase, and under the second and third deeds he claims a proportion of the property therein mentioned, excluding all the children

ter the date of said deeds respectively, from any
r interest therein.

bill further states that the action of trover came
was tried at March Term, 1858, when, under the
of the court, plaintiffs in said action, Smith and
btained a verdict for all the negroes mentioned in
st deed, from which verdict complainant appealed,
hich is now pending in the Superior Court; and
nith and wife are threatening to bring suit against
inant for the property in the second and third
or their share or proportion thereof as aforesaid.

bill charges that Kennedy was an uneducated and
nt man, and unable so write, and that the aforesaid
were prepared and drawn up by persons unlearned,
ad no knowledge of law, and that the intention of
edy was to retain possession of said property and
until his death, and that then all his legitimate chil-
together with the said Ebaline, were to share the
equally; and said conveyances were never delivered
g his lifetime, but were in his possession at the time
death.

prayer of the bill is, that Smith and wife be en-
l from further proceeding with their action at law,
hat said conveyance be reformed so as to express the
and real intentions of the donor, and that the said
ne be decreed to receive only an equal share of said
erty with the lawful children of said Kennedy.

e following is a copy of the last will and testament
Edward Kennedy, attached as an exhibit to complain-
bill, viz:

gia,
tuall county. } In the name of God, AMEN:

Edward Kennedy, of said State and county, being of
need age, and knowing that I must shortly depart
this world, deem it right and proper both as respects
elf and my family, that I should make a disposition

of my property and do make and ordain this my last will and testament, hereby revoking and annulling all other wills made by me and particularly revoking a conveyance of property which was to go into effect at my death, which bears date the twenty-fifth day of March, eighteen hundred and forty-one, recorded in 2d book D., page 196, 1st May, 1841, which deed conveys certain property at my death to my two sons, Eli and Hampton, and which said deed is hereby revoked and pronounced null and void.

First. I desire my body to be interred in a decent and christian-like manner suitable to my circumstances and condition.

Second. I desire all my just debts to be paid without delay.

Third. I give and bequeath unto my beloved wife, Charlotte Kennedy, during her natural life, three hundred acres, lying in Tatnall county, Georgia, known as the Damper old place, originally granted to James Hancock, and after her death to go to my son Raiford Kennedy; and I further give to my said wife all the bedding and household furniture which she owned at the time of our intermarriage, to be entirely at her disposal; and is further my will that my wife shall remain upon the plantation which I may be in possession of and occupying as my house at the time of my death, and be supported out of my estate, with all the children which may be minors at the time of my death, until my youngest child shall attain the age of twenty-one years, or so long as she may remain my widow, and conduct herself properly in the opinion of my executors, reserving to my executors the entire control of my whole estate, and should it appear at any time that my wife is mismanaging or wasting the estate, then it is my will that my executors immediately discharge her from all further management and control, and I hereby appoint my executors guardians to my minor children, with full control over said minors in

they deem it necessary on account of any improper
t on the part of my wife.

th. It is my will that my son Alexander Kennedy,
ghter Sarah Duke, my son Edward Kennedy, my
nry Kennedy, my daughter Witthy Ann Stubbs,
William Kennedy, my daughter Miriam Strick-
y son Solomon Kennedy, and my daughter Eliza-
urrency, have no more of my estate than the prop-
hich I have already given them.

1. Whereas, on the eighteenth day of January,
en hundred and thirty-three, I conveyed by deed to
o sons, Eli Kennedy and Hampton Kennedy, two
slaves Isham and Tena, which deed of conveyance
ecord in Tatnall county, in book D., page 75, and
another conveyance, deeded to them two negro
Bryant and Morris, and my land and plantation
I now live, and all my lands on the north side of
as' creek, which conveyance is recorded in said
s, in book D., page 11, and bears date 23d July,
I now will and bequeath to my said son Hampton,
on Eli being now dead,) one-half the property as above
yed, being *the* half to which he is entitled under the
named conveyance; also I will and bequeath to
id son, one bed and furniture, one horse, saddle and
, and twenty head of stock cattle: Provided, that
ortion of the above named property which I may
up to him before my death is to be considered as an
ce made him, and to be deducted from the above
my death.

th. All the rest of my property which I may leave
y death, of whatsoever kind, whether real or person-
d all my money in hand, and all debts which may
e at my death, I will and bequeath to my illegiti-
daughter Ebaline Sikes, and the children I now
or may hereafter have by my present wife, Char-
, all share and share alike, to be divided when the

Brewton vs. Smith and Wife.

youngest child shall attain the age of twenty-one years. My executors, however, are authorized, in their discretion, to loan to each one of the children, as he or she may come of age, a portion of the property for his or her support.

Seventh. I appoint my son Solomon Kennedy and my friend James P. Daniel, executors to this my last will and testament.

In witness whereof, I, Edward Kennedy, do hereto set my hand and seal, and publish this as my last will and testament.

his

EDWARD ✕ KENNEDY, [L.S.]

mark.

Signed, sealed and published by Edward Kennedy as his last will and testament, on the nineteenth day of October, 1850, in presence of us.

EVERETT M. G. STUBBS.

HENRY KENNEDY.

E. H. BACON.

The following admission and agreement was made and signed by the solicitors of the respective parties, to-wit:

B. BREWTON, next friend, &c.,	} Tatnall Superior Court, March Term, 1859—Bill in Equity and prayer for injunction.
complainant, and	
WILLIAM SMITH and EBALINE, his wife, defendants.	

- In the above case it is admitted on the part of the complainants that said grantor one month after the execution of the said deed, carried the same to the clerk of the Superior Court, telling him there was a deed, by which he had provided for his daughter Ebaline, and he wished it recorded. That said clerk recorded the same and handed
- it to grantor; that said Ebaline was of the age of one year and five or six months, at the time said deed was executed, and resided with her father, the grantor, at that time and continued to reside there until her marriage in 1853;

Brewton vs. Smith and Wife.

also agreed by defendants that the bonds usually in injunction shall be waived, and it is agreed that case be submitted to his honor, the judge of said , upon bill and above agreed state of facts, and defer, and that same be argued by brief, and it is further agreed that said case be carried to Supreme Court at term after his decision upon said demurrer is rendered by consent.

WM. B. GAULDEN, compl's sol'r.

JOHN M. MILLEN, def'ts sol'r.

March 23rd, 1859.

defendants demurred to the bill for want of equity, and the Fleming pronounced the following judgment, sustaining the demurrer and dismissing complainants' bill :

REWTON, next friend, <i>et al.</i>	} Tatnall Superior Court—
vs. .	
SMITH and wife.	} Bill for Injunction and to reform Deed—Demurrer.

This bill is filed to reform a deed and for injunction. The object of the injunction is to stop proceedings at law commenced for the recovery of certain negroes mentioned in the deed until the deed should be reformed and the reformation proposed would destroy the right to recover. Whether the injunction would be granted, then, depends on the question whether the deed will be reformed.

The ground of the application to reform the deed as set forth in the bill is this: "That the said Edward Kennebec at the time he executed said conveyance, was a man ill educated and unable to write—that he employed men ill educated, and who had little knowledge of law, to draw said conveyance; that he intended to retain possession of said property and deeds until his death, and did retain possession of the same until his death—the property remaining in his possession and the deed found among his papers at his death, and that said conveyances were never delivered. That he failed by reason of the ignorance of himself and the party who drew up said deeds to appoint

a trustee to protect this property for the after-born children mentioned in said deeds, who were born and are named as heretofore mentioned. That it was the intention of said Edward to provide for said after-born children, as well as the said bastard, Ebaline, by said deeds of conveyance. That said William and Ebaline rely wholly and entirely upon said defective conveyance to maintain said action, and to deprive your Orator and Oratrixes of their just shares in said property. That at the execution of the first deed (the deed under which the action is brought,) the wife of the said Edward was pregnant with your Oratrix Dicy, and said Dicy, was born before said deed was recorded," &c.

In addition to the above allegations in the bill, the counsel have agreed upon the following facts, which of course must be considered as part of complainant's bill, viz: "That one month after the execution of the said deed, the grantor carried the same to the clerk of the Superior Court, telling him that there was a deed by which he had provided for his daughter Ebaline, and he wished the same recorded—that said clerk recorded the same and handed it to grantor—that said Ebaline was of the age of one year and five or six months at the time said deed was executed, and resided with her father, the grantor, at that time, and continued to reside there until her marriage in 1853. It is also agreed by defendants that the bonds usually given in injunction shall be waived, and that the cause be submitted upon the bill, and above agreed state of facts and demurrer, and that the same be argued by brief, and that said case be carried to the Supreme Court, at the next term after the decision upon said demurrer is rendered, by consent."

Upon the above state of facts, I am asked to reform the deed and grant injunction. If the allegation be true that the deed was never delivered, then there is no deed before me, and of course no deed to be reformed. Delivery

essential to the perfection of a deed, and until delivery not executed, the grantee receives no title, for the donor has parted with none. What is there to reform? In such a state of facts, the idea of reformation is preposterous. If the deed was delivered, then, upon a *proper* demurrer, am I at liberty to assume that the deed was delivered in the face of the allegation in the bill that it was never delivered? Is it competent for the complainants to abandon this allegation, and say that although the allegation is made, yet the facts agreed upon by counsel prove a delivery? I doubt if the complainants would be willing to take this position, for it would be giving up the principal ground of their defence to the action pending on the common law side of this court. But I ask you, if they be willing can they do so? The allegation in their bill that the deed was never delivered, amounts to an allegation that the facts set out and agreed on do not prove a delivery. If this be so, I repeat, there is no case before me to be reformed. This is the case *made* by the bill; can I decide this demurrer upon a case *not made* by the bill? I may think, and in point of fact I do think, that the deed was delivered—that the facts agreed upon prove the delivery, but I cannot act upon that opinion in the decision of this demurrer. The question of delivery is not before me. The bill alleges that the demurrer admits that the deed was never delivered. This admission of course is for the purposes of this demurrer—it cannot extend beyond it, for if I were to overrule the demurrer the defendant would have the right to answer the bill and deny its allegations. If he is not precluded in this proceeding from denying what he now admits for the purposes of the demurrer, surely he will not be precluded from denying the same thing on the trial of the case on at common law. In other words, his demurrer now would not be evidence against him on the trial of the

common law action. So far as this bill seeks a reformation of this deed it is to my mind clearly demurrable.

And now what is the ground upon which the injunction is asked? The ground, if I understand the bill, is that the deed may be reformed. But no case for reforming the deed is made. Why then enjoin the party to have *that done* which, by the complainant's own showing *cannot be done*. I am the better satisfied with this conclusion, because, even if the bill had admitted the delivery, there would be no case for reforming the deed. This question is really not before me. I will not therefore argue it at length, but content myself with referring to one or two authorities. The reformation asked for is this, that the grantor *intended* to provide for after-born children, but did not do it in consequence of his own ignorance and the ignorance of the draftsman. The ignorance is this, that the grantor and his draftsman were both ignorant that a direct conveyance to persons not in being could not be made. The bill therefore asks that a trustee should be appointed that the *intention* of the grantor might be carried out. The case thus presented is a naked case of ignorance of law. The Supreme Court of the United States in the case of *Hunt vs. Rousmanier*, say: "The question then is, ought the court to grant the relief which is asked for, upon the ground of mistake arising from any *ignorance of law*? We hold the general rule to be that a mistake of this character is *not a ground for reforming a deed* founded on such mistake and whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something *peculiar* in their character."—1 Peters, 15.

"In courts of equity ignorance of the law shall not affect agreements, nor excuse from the legal consequences of particular acts."—Story's Eq. Juris., 126.

To express the same thing in different language; courts of equity will enforce a deed or agreement according to

! effect, no matter what may have been the intention of the parties, if the mistake arise from ignorance of law. Mr. Story, referring to 3 Meriv. Reports, 195, gives his illustration of the principle: "So, when a party executes a power of appointment, and executes it absolutely without introducing a power of revocation upon a mistake of law, that being a voluntary deed it was revocable, but was denied." Here the party intended to reserve to himself the power of revocation, but under a mistake of law, that he had the power because it was a voluntary deed he did not reserve it in the instrument, and yet effect was given to the deed as *executed* and not as *intended*. In the case before me the grantor *intended* to provide for the Sikes, and his children hereafter to be born; in ignorance of the law he makes a direct conveyance which conveys the whole interest in Ebaline, effect must be given to the deed as *executed* and not as he *intended*. The fact that the party *intended* to make the *very deed* which he made—there is no allegation that he intended any other deed, but he made it under a mistake of law, that it would have a certain effect, such a mistake is not a ground for reforming it. Mr. Story, after examining the leading cases on this subject, says: "Without undertaking to assert that there are none of these cases inconsistent with the rule, it may be affirmed that the real exceptions are very few, and generally stand upon some very special pressure of circumstances."—Story's Eq. Jur., 156. Mr. Story adds: "In America, the general rule has been recognized as founded in sound wisdom and policy, and fit to be *upheld with a steady confidence*. And hitherto no exceptions to it (if any) will be found not to rest upon a mere foundation of a naked mistake of law, however gross, and settled the principle may be, nor upon mere ignorance of title founded upon such mistake." This remark of Mr. Story will be found to be fully sustained on a close examination of the cases supposed to be ex-

ceptions to the rule. A close examination of those cases will show that in point of fact relief was granted, not on the ground of mistake in law, but that the mistake in law was only *a means of proving some other ground of relief*. The case of Lansdowne vs. Lansdowne, 1 Mosely, 364, is the only case to which this remark possibly might not apply. But even in that case the decision might well have been put on other grounds. The Supreme Court of the United States in Hunt vs. Rousmaniere, in commenting upon this case say: "Admitting for the present, the authority of this case, it is most apparent from the face of it that the decision of the court might well be supported upon a principle not involved in the question we are examining. The subject that the court had to decide arose out of a dispute between an heir-at-law and a younger member of the family, who was entitled to an estate descended, and this question the parties agreed to submit to arbitration. The award being against the heir-at-law, he executed a deed in compliance with it, but was relieved against it on the principle *that he was ignorant of his title*. If the decision of the court proceeded upon the ground that the plaintiff was ignorant of the *fact* that he was the eldest son, it was clearly a case proper for relief. If the mistake was of his legal rights as heir-at-law, it is *not going too far to presume* that the opinion of the court may have been founded upon the belief that the heir-at-law was *imposed upon* by some unfair representation of his better informed opponent.

If this reasoning of the Supreme Court of the United States be correct, even the case of Lansdowne vs. Lansdowne is not an exception to the general rule. This reasoning satisfies me of another thing. If the case of Lansdowne vs. Lansdowne be an exception to the general rule it is not entitled to be respected as authority, why, otherwise, should such an effort be made to get rid of it.

demurrer is sustained and the bill dismissed with

W. B. FLEMING, Judge E. D. Ga.

M. MILLEN, for demurrer; W. B. GAULDEN, *contra*.

which decision and judgment counsel for complain-excepts, and assigns the same as error.

M. B. GAULDEN, for plaintiff in error.

JOHN M. MILLEN, and JOHN SCHLEY, *contra*.

By the Court.—BENNING, J., delivering the opinion.

The demurrer to the bill, was for want of equity. The court below sustained the demurrer. Therefore, the question is, was there equity in the bill?

1. The deeds were delivered, or they were not delivered.

1. First, if they were not delivered, was there equity in the bill? We think that there was. The deeds, even if they were not delivered, make a cloud over the true title; and, therefore, the owners of that title, are entitled to have them delivered up to be cancelled. It is true, that there is no special prayer adopted to this aspect of the case; but, there is the general prayer, and it will answer the purposes; or if it will not, a suitable prayer may be added to the bill by amendment, as matter of right, under the amendment act of 1854.

Secondly; suppose that the deeds were delivered, was there, in that case, equity in the bill?

In that case the bill becomes a bill to reform the deeds in a particular manner, that it may accomplish what it alleges, was the intention of the maker of them. Is the case made by the bill, one that will authorize a court of equity to require the deeds to be so reformed?

The first of the three deeds is as follows: "I, Edward Kennedy, sen., of the county and State aforesaid, for and

in consideration of the good will and affection which I have for my illegitimate daughter, Ebaline Sikes, of the age of one year and five or six months old, hath given and by these presents doth give and bequath to her, the said Ebaline Sikes, a certain negro woman named Ann, and her child Lydia, and all her increase. I give and bequeath the aforesaid slave to the said Ebaline Sikes, and any other child or children which I may hereafter have by my wife Charlotte Kennedy; and I do further give unto the said Ebaline Sikes one bed and furniture to herself alone, to the only proper use and benefit of them the said Ebaline Sikes and the other heirs which I may hereafter have by my present wife, Charlotte Kennedy," &c.

The part of this deed which the bill alleges to be defective and to need amendment is the part which relates to after-born children.

The other two of the deeds contain similar provisions, as to after-born children.

The amendment which the bill alleges to be needed, is the addition to the deeds of a trustee for the after-born children, to hold the title for them, until their birth.

The grounds for reforming or amending the deeds in this way, are thus stated in the bill:

"That the said Edward Kennedy, at the time he executed said conveyance, was a man unlearned and unable to write—that he employed men unlearned, and who had little knowledge of law to draw up said conveyance; that he intended to retain possession of said property and deeds until his death and did retain possession of the same until his death—the property remaining in his possession and the deed found among his papers at his death, and that said conveyances were never delivered. That he failed by reason of the ignorance of himself and the party who drew up said deeds to appoint a trustee to protect this property for the after-born children mentioned

deeds, who were born and named as heretofore mentioned. That it was the intention of said Edward to convey the property to said after-born children, as well as to the said Ebaline, by said deeds of conveyance. And to rectify such their unjust conduct, they make various averments, all of which your orator charges to be untrue, and expressly charges that the said Edward by said conveyances, did intend to convey said property to after-born children as well as to said bastard Ebaline, and was only prevented from so doing by the ignorance of law, of himself and the party who drew the conveyances."

Are the grounds thus stated in the bill sufficient to authorize equity to require the deeds to be so reformed? According to these statements in the bill, the author of the deeds intended by them to convey the property to "after-born children," "as well as" to his born children; and he "was only prevented from so doing by the ignorance of law, of himself and the party who drew up the conveyances;" "he failed, by reason of the ignorance of himself, and the party who drew up said deeds, to appoint a trustee to protect this property for after-born children." And, so far as these statements relate to the *intention* of the donor, they are true, beyond the possibility of question, for they are supported by the deeds themselves. It is perfectly clear, from the face of the deeds, that the intention of the donor was by deed to convey the property as well to his children to be born, as to his children born. In this respect the case has greatly the advantage over most cases for reforming written contracts. In most of those cases, the object is, to set up an intention different from that found on the face of the written contract. In this case, the intention found on the face of the deeds, (the contents,) is an intention, by those very deeds themselves, to convey property, as well to children to be born as to children born; and the

object of the bill is, to make the deeds such, that they shall carry out this very intention. Such, in a word, that they shall be able to accomplish their own clearly expressed wishes. This case, then, is free from the danger attending most cases of the sort; namely, that a court in undertaking to reform the contract, will substitute some contract of its own making for the contract of the parties making.

Why then should any change be made in the deeds? If they clearly express the donor's intention, in what can they be deficient? Children to be born are, of course, not born—are persons not in existence; and it is said that there is a general principle of law, that a conveyance to a person not in existence, is void, unless made to a trustee for that person, to hold the property till he comes into existence. Hence, the bill concedes the deeds to be defective in the want of a trustee for the after-born children; and consequently, it prays that one may be added to the deeds. Now the interposition of a trustee in such a case, is obviously, a matter of the merest technical form; therefore, ignorance that the law requiring such a trustee, ought to be a sufficient ground to justify equity in supplying one, if ignorance of the law is sufficient to justify the interposition of equity in any case. And ignorance of the law is a sufficient ground to justify the interposition of equity in some cases. The case of Wyche and wife vs. Green, (16 Ga. 47,) is one. In that case, the bill stated, "that by a mistake of the said Batt Wyche, in the use of words not proper and technical for the conveyance of such meaning," (the one sought to be substituted,) "the said intentions of the said Batt Wyche, failed to be equally" [fully] "expressed therein."—*Ib.* 53. This is but saying that Wyche, from not knowing what were the proper and technical words necessary, failed to use them. And this court held the case to be one for the aid of equity. That is a far stronger case than this.

think, then, that this is a case in which a court would be authorized to require the deeds to be by the interposition of a trustee for the after-dren, to take the property intended for them at birth. And, therefore, we think that there is in the bill, in this, its second aspect.

It is to be borne in mind, however, that this is a case in which the counsel on both sides agree that a trustee is to be interposed to the deeds in order to make them sufficient to carry out the donors intentions as to the after-born children.

This being so, this court is not bound to look into the question, whether the counsel are right in this or not; but it may, so far as the present case is concerned, act on the assumption that they are right, and that the interposition of a trustee is necessary to the deeds in order to make them sufficient to convey an interest to the after-born children.

We will, however, say for myself, that in my opinion, the deeds are quite sufficient as they stand, to effectuate the intention of the testator; and therefore, that, in this case, a trustee was not necessary.

The first deed. That is a deed in which the words are, "I give and bequeath the aforesaid slaves to Ebaline Sikes, and any other child or children who may hereafter have by my wife Charlotte."

The intention plainly was, that his child, Ebaline, should have the whole interest, provided he did not have other children born to him; but if he did, then that such children should share in the interest equally with Ebaline. In giving effect to the intention, the words he used may be taken to be equivalent to these words: "I give the whole interest to my child Ebaline, *on condition*, nevertheless, that if he should hereafter have other children, a part of the interest shall pass from her to them; viz: such a part as may be necessary to effect the intention. The effect shall be, to make her and them take each an equal interest in the slaves." And here we have but

the common case of an estate *on condition*—the case of the whole interest conveyed to one subject to be divested in whole or in part on the happening of a subsequent event. The whole interest is conveyed to the child Ebaline, subject to be divested from her, as to a part, on the birth of another child, and vested, as to that part, in that child; and the whole interest is, then, to be in the two children, subject to be divested from them, as to a part, on the birth of a third child, and vested as to that part in that child; and so on, as often as a new child may be born.

Now such a conveyance as this, is, I think, not only valid, but of not uncommon occurrence. The law permits an estate of any quantity of interest, even the greatest, to be conveyed on condition; as “an estate to a man and his heirs, *tenants of the manor of Dale*,” which “is an estate on condition that he and his heirs continue tenants of that manor;” an estate in fee simple on condition that rent be paid.—2 Black. Com. 154; see too, Comyn. Dig. “Estate in fee simple,” (A. C.) and note *d*, where a number of cases are collected.

In my opinion, then, these deeds are quite sufficient as they are, and need no mending; still, for the reason aforesaid, viz, that the counsel on both sides take a different view, I acquiesce in the conclusion above announced, so far as this case is concerned.

Judgment reversed.

GILES vs. THE STATE.

1. The Act of 1811, giving Justices of the Peace, in cases when a person is discharged by them for want of sufficient cause of commitment, a discretion to award costs against the prosecutor or against the accused, is not applicable to the case of slaves.
2. It is an abuse of the discretion given by that Act, to award costs against the accused in a case where there is *no evidence* against him.

Certiorari, in Chatham superior court. Decision by Judge FLEMING, at January Term, 1859.

Willis, and about forty other slaves belonging to Wm. B. Giles, were arrested and brought before a court of magistrates charged with the crime of murder. Upon examination of the witnesses, the magistrates were of opinion that there was sufficient evidence to warrant the commitment of Willis to the jail of Chatham county, to stand his trial for the alleged offence, and he was accordingly committed. As to the others, there being no evidence at all against them, the court ordered that they be discharged from arrest, upon the payment of the jail fees and all the costs of the examination.

To this order, William B. Giles, the owner of the slaves, excepted, and the question was brought by certiorari before the superior court, when, after argument, Judge Fleming made the following decision, viz :

William B. Giles,	}	Certiorari.
vs.		
The State of Georgia.		

By the 11th section of the Act of 1811, it is enacted "when any person charged with any offence and brought before a justice or justices of the peace, shall be discharged for want of sufficient cause of commitment, the justice or justices may, in his or their discretion, discharge the party with costs, or direct the costs to be paid by the prosecution." As I understand this Act the costs are to be paid by the party charged or by the prosecutor, and it is left to the justice or justices to say which party shall pay costs. I do not understand that the justices may throw the costs upon the county. This discretion given by the statute may perhaps sometimes be exercised arbitrarily, and in *such cases* I do not doubt the power of this court to review it. In the absence of any proof that this discretion has been arbitrarily exercised, I do not feel

myself at liberty to interfere with it. I should say the prosecutor ought never to be burdened with costs where the justice is satisfied that he has acted in good faith and with a view to the public good. Public policy requires this, for otherwise no man would move in a prosecution from considerations of public good or for the promotion of public justice. This record furnishes no proof that the prosecutor in this case acted from malicious motives. We must therefore assume that he acted in good faith, and if he acted in good faith, he ought not to be made to pay costs. True, it seems hard that the accused should be made to pay, but this is his misfortune. So far as appears from this record, my opinion is that the discretion was properly exercised. I except from this, of course, the case of the slave committed for trial. In that case the costs should wait the result. Let the judgment be affirmed.

W. B. FLEMING.

Judge E. D. Geo.

To which decision counsel for Giles excepts, and assigns the same as error.

NORWOOD, WILSON & LESTER, for plaintiff in error.

Sol. Gen. HARTRIDGE, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

1. This court has frequently ruled that penal statutes do not include slaves unless slaves are named. Any other rule applied to our statutes, will lead to inextricable difficulty. As in this case, it leads to the conclusion that costs may be awarded against a *slave*, not against his master but against the slave—a conclusion not very consistent with reason when we consider the inability of a slave to pay costs—an inability which is not accidental or contingent, but grows out of his *status*.

Stripling vs. Davis.

2. We think too it is an abuse of the direction given by this Act, to award costs against an accused person in a case, as in this instance the record expressly shows, when there is *no evidence* against him. If *this* is not an abuse of the discretion what can be?

Judgment reversed.

STRIPLING vs. DAVIS.

A rule of survey taken out pending an action of ejectment, should be limited to the purpose for which it was intended, namely, to ascertain the *locus* or the true boundaries of the premises in dispute; and it is an excess of power to delegate to the surveyor the authority to *make corners*, and to run and *mark* boundary lines. This is to lay off and admeasure lands and not to re-survey them.

Ejectment, in Tatnall superior court. Before Judge FLEMING, at March Term, 1859.

This was an action of ejectment brought by Samuel Davis against James B. Stripling, for the recovery of one hundred acres of land situated in the county of Tatnall. The declaration described the land as a "certain tract of land lying in said county, containing one hundred acres, being part of a tract of land originally granted to Stephen Bomen, containing four hundred acres, and bounded as follows, viz: North by George McCall, east by vacant land, south by vacant land, and west by old river bounties; said one hundred acres to be admeasured and laid off as follows, viz: Commencing on the back line of said tract and running parallel with the upper line of said tract so as to include the settlement and plantation on which Frederic Dinkins resided on the 13th October,

1854, and since occupied by — up to —, until said line intersects the front line of said tract bounded by the river bounty lands, then following the line of said bounty lands to a sufficient distance to make up the quantity of one hundred acres, by running a line thence parallel with the upper line till it intersects the back line, then running said line till it intersects said back line, then following said back line to the starting point."

The defendant pleaded the general issue and the statute of limitations.

The plaintiff moved a rule of survey in the following terms:

"It is ordered by the court that the county surveyor does make a survey of the premises in dispute before the next term of this court, and that he give each party ten days notice of the time and place of said survey, the survey to be made as follows: The whole of the tract of — hundred acres, originally granted to Abner Davis for — hundred acres, to be re-surveyed, then a corner to be made on the back line at such a point that a line leaving said back line with a line parallel to the upper line of said tract and extending down the river bounties will pass just outside of the old settlement where Frederic Dinkins formerly lived and afterwards occupied by John Davis, deceased, and afterwards by Maccha Davis, and from said corner run and make said line to the river bounty lands, then following the line of the river bounties to such distance that a line run back again to the back line and parallel with the upper line will make up one hundred acres, and then mark and run said line so as to take in the premises in dispute."

To the granting of this order counsel for defendant objected, on the ground that said premises in dispute had never been surveyed, or any lines run or marked out around said land, and that no re-survey of the same could be made. The court overruled the objection and granted the order, and counsel for defendant excepted.

WM. B. GAULDEN, for plaintiff in error.

BACON & LEVY, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

Time immemorial has sanctioned the practice of authoring re-surveys of land to be made pending an action of ejectment to try the titles to a particular tract. How the practice originated, it is needless to inquire. It is too well established to be questioned. It subserves the purposes of justice.

We are not aware, however, that it was ever supposed that the power of the court extended further than to order a survey to be executed of the premises in dispute, and to have the lines of contiguous tracts run, if necessary to ascertain the *locus*. And this is all that is necessary for the purposes of proof.

But the rule in this case goes further and directs a specific survey to be made of a parcel of land that has no boundaries, and to make a corner, and to run and *mark two lines*. This is not to re-survey, but to lay off and admeasure land. Believing this to be an innovation, and one not even justified by the exigencies of the case, and one which may be productive of mischief, we are not prepared to endorse it by our judgment. The rule should be restricted as heretofore, to making a re-survey merely of the premises in dispute; but not extended so as to delegate authority to the surveyor to *make corners* and run and *mark* boundary lines. That must be done, we apprehend, by another and different proceeding.

Judgment reversed.

CASES ARGUED AND DETERMINED*
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT MACON,
JUNE TERM, 1859.

Present—JOSEPH H. LUMPKIN,
HENRY L. BENNING,
LINTON STEPHENS. } Judges.

HOWARD, et. al., vs. SNELLING & SNELLING.

1. One or more of several joint-tenants, or tenants in common, may sue separately in trover.
2. If the *cestui que trusts* are entitled to the *possession* of property under a trust deed, they may maintain trover against a stranger, to recover the property, and such recovery would be a protection to the defendants, against a suit brought by the trustee.
3. If two are sued in trover, and no conversion is proven against one of them, it is no ground for a non-suit, but the verdict should be framed in accordance with the testimony.

Trover and Nonsuit, in Stewart Superior Court. Before Judge KIDDOO, April Term, 1859.

This was an action of Trover, brought by Harman H. Howard and wife, and others, against John D. Snelling

and James W. Snelling, to recover certain negro slaves, under the following deed, to-wit :

This indenture, made this ninth day of August, in the year of our Lord one thousand eight hundred and nine, between Samuel Tompkins, of the county of Washington, and State of Georgia, of the one part, and Robert Rutherford, of the Town of Milledgeville, Baldwin county, and Franklin Rutherford, of Washington, both the latter of said State of Georgia, of the other part, *Witnesseth*, That for and in consideration of the trust and confidence reposed in the said Robert Rutherford and Franklin Rutherford, as well of the love and good will and affection which he hath for and toward the children of Polly Watts, otherwise Polly Tompkins, hath given and granted, and doth by these presents freely give and grant unto the said Robert Rutherford and Franklin Rutherford the following negroes, to-wit : Jack, February, Rhody, Stephen and Sarah ; to have and to hold the aforesaid five negroes unto the said Robert Rutherford and Franklin Rutherford, upon trust. Nevertheless, that the said Robert Rutherford and Franklin Rutherford, or either of them, shall and do well, truly, and without partiality, divide and equally apportion the before mentioned negroes, together with their increase at the death of the said Samuel Tompkins, or within nine months thereafter, among all the children that may be born of the said Polly Watts, otherwise Polly Tompkins, at the end of said nine months, whether legitimate or illegitimate, and the said Samuel Tompkins, for the free and more clear disposal of the aforesaid five negroes, as well as their increase, doth covenant to and with the said Robert Rutherford and Franklin Rutherford, to and for the use of said children of the said Polly Watts, otherwise Polly Tompkins, of which children are now in life, John, Betsy, Samuel, and Polly, sons and daughters of the said Polly Watts, otherwise Polly Tompkins, shall have, hold and occupy, and enjoy,

provided, nevertheless, that the said Samuel Tompkins, and also the said Polly Watts, otherwise Polly Tompkins, shall continue to use, employ and receive all and singular the services of the said five negroes, and all and every of them, for and during the full end and term of the natural life of the said Samuel, and during the life, also, of the said Polly Watts, otherwise Polly Tompkins, without any manner of trouble from the said Robert Rutherford and the said Franklin Rutherford, or either of them; and the said Samuel, for the more free and clear disposal of the said five negroes, unto the said children of the said Polly, and to their heirs and assigns, doth make and execute this reasonable instrument of writing, with the special reservation to the said Samuel and Polly, as herein expressed. In witness whereof the said Samuel Tompkins hath hereunto set his hand and affixed his seal, the day and year within written.

(Signed) his
SAMUEL X TOMPKINS,
mark.

Signed, sealed and delivered in presence of
WM. RUTHERFORD,
JESSE ARMSTRONG, J. P.

ENDORSED.—“I do hereby acknowledge to have delivered the negroes herein mentioned to Robert Rutherford and Franklin Rutherford, for the use herein mentioned, with the reservation herein specified, this 9th day of August, 1809.

(Signed) his
SAMUEL X TOMPKINS,”
mark.

WM. RUTHERFORD,
JESSE ARMSTRONG.

Recorded in the Clerk's office of the Superior Court of Washington county, 12th August, 1809.

It appeared from the evidence that Samuel Tompkins

died on the 23d February, 1856; that said Samuel and Polly Watts, otherwise Polly Tompkins, had born unto them eight children, to-wit: Samuel, Julia Dorothea, Elizabeth, John, Mary, William, Stephen and Nancy Ann; that Polly Watts, the mother, died in 1837; that Samuel and Julia Dorothea died before their mother, minors, and without having married, and leaving no descendants; that William, Stephen and John died before their father, leaving children, and that Harman H. Howard, one of the plaintiffs, was the administrator of William, and that John Smith, another of the plaintiffs, was the administrator on the estates of John and Stephen, deceased; that Elizabeth first married — Williams, and afterwards a man by the name of Spear, and that she is now a widow, and one of the plaintiffs in this suit; that Mary married Harman H. Howard, also a plaintiff; that Nancy Ann is the wife of Joseph Miller, and that neither Miller nor his wife is joined as plaintiff in the action; that the negroes sued for were the children, or descendants, of Harriet, a woman who was the daughter of Rhody, one of the negroes mentioned in the deed of trust. It further appeared that James W. Snelling, one of the defendants, never had possession of but two of the slaves, to-wit: Harriet and her youngest child, and that Robert Rutherford, one of the trustees, was dead, and Franklin Rutherford, the other and surviving trustee, resided in the State of Alabama. The value of the negroes, and demand and refusal, were proved.

Plaintiff, having proved the above stated facts, closed, when defendant moved for a non-suit, on the following grounds:

1st. Because plaintiffs had no legal title to the negroes sued for and mentioned in their declaration.

2d. Because of the non-joinder of Mrs. Miller and her husband, as co-plaintiffs, who were joint tenants or owners of said negroes, with plaintiffs.

3d. Because there was a mis-joinder of defendants, it being shown that James W. Snelling never had possession of any of said negroes except two.

After argument the Court granted the motion and nonsuited plaintiff, to which decision plaintiffs excepted, and assign the same as error.

JOHNSON & SLOAN and B. H. WORRILL, for plaintiffs in error.

JONES & JONES, WIMBERLY and BEALL, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

Was the Court right in granting a non-suit in this case? It was moved for on three grounds—1st, Because of the non-joinder as plaintiffs of all the parties interested in the property.

And this presents the question, whether one or more joint-tenants, or tenants in common, may sue separately in trover. In *Starnes & Pearce*, (6 Geo. Rep., 84,) it was decided that it might be done; and that no advantage could be taken of it on the trial. When this objection was made, the case was on the appeal trial. We are inclined to think that such omission would not be good by plea in abatement, notwithstanding the dictum to the contrary, in the case referred to.

The second ground upon which this nonsuit was awarded is, that the plaintiffs had no legal title, in themselves, to the property in dispute. The life estate reserved to Samuel Tompkins, and Polly, his wife, terminated in 1856. In nine months thereafter an equal division of the negroes given by the deed was to have been made. Robert Rutherford, one of the trustees, is dead; the other, Franklin Rutherford, resides in Alabama. Some of the Court think that the trust terminated at the time that the negroes were to have been divided; that the trust was

created for the benefit of after-born children, who were to be let in under the conveyance. All of us agree, that if this were not so, that the *cestui que trust* were entitled to the possession of the negroes, and could, therefore, maintain this action against a stranger, to recover the possession. The trust is nominal. The defendants themselves have sworn, in defence of a suit by the surviving trustee, against them, that he is no longer a trustee; and we think they were more than half right. He is aged, and infirm, and a non-resident. He had best make a formal surrender of his trust.

Would not a recovery by the plaintiffs protect the defendants? Suppose the trustee were to recover those negroes; it would be for the benefit of the plaintiffs, and solely for the purpose of dividing the negroes between them. And if it were shown that they had already recovered the property themselves, would not a court of equity interpose and enjoin the suit? Undoubtedly it would.

3dly. Ought a non-suit to have been granted on account of the misjoinder of the defendants?

It seems from the record that there was no proof authorizing a recovery against James Snelling. The testimony is, that he once held in his possession Harriet and her youngest child. There is no evidence that he converted them, nor was any demand made of him. Instead of non-suiting the case, then, it should have been submitted to the jury, that if they found that John Snelling had all the slaves sued for in his possession, at the time they were demanded, or that he had made *distribution* of them, in the language of the witness—and there is evidence from which it may be inferred that such was the fact—in that event, they might find damages against John Snelling, for all the slaves. If however, they found, from the proof, that two of the negroes, Harriet and her youngest child, were in the possession of James Snelling, and there was no proof of any con-

version by him, they should find generally for James Snelling, and a verdict against John Snelling for the rest of the negroes. In this way the verdict would cover all the issue, and be obnoxious to no legal objection.

Our judgment, therefore, is, that the non-suit be set aside and the case re-instated, and upon the next trial, unless the plaintiffs can prove a conversion by James Snelling, his name should be stricken from the writ.

Judgment reversed.

PARKER vs. BEEMAN.

1. A tenant cannot so withdraw his claim, under the rent act of 1827, (Cobb, 701,) as to relieve himself from the penalty of being assessed for double rent, in case the issue is found against him.
2. An appeal lies under the rent law of 1827.

Summary proceedings, to eject tenant holding over. In Terrell Superior Court, ALLEN, Judge, presiding, at May Term, 1859.

This was a summary proceeding, under the act of 1827, by William J. Parker, to evict from the possession of premises leased, Emanuel P. Beeman, a tenant holding over after the termination of the lease. Parker made the affidavit required by said act, whereupon a process was issued by a Justice of the Peace, requiring the sheriff to turn the tenant out, and put the lessor into possession. Beeman filed his affidavit, denying that he held under Parker, and alleging that he claimed and held possession in his own right, whereupon, as provided by law, the proceedings were arrested before the Justice, and the case transferred to the Superior Court, there to be tried.

There was a trial in the Superior Court, before a petit jury, who found for the plaintiff, from which verdict the defendant appealed. The case came up for trial on the appeal, and, a jury being empaneled to try the same, the defendant, Beeman, moved to withdraw his affidavit. Counsel for plaintiff objected. The Court overruled the objection, and allowed the affidavit to be withdrawn, to which ruling plaintiff excepted.

Plaintiff then moved to dismiss the appeal. The Court refused the motion, holding that the withdrawal of the affidavit operated as a disposal and dismissal of the case, and plaintiff excepted.

Plaintiff then moved that a writ of possession be issued from the Superior Court, upon the verdict and judgment rendered and entered at the common law, to turn defendant out and put plaintiff in possession of the premises. This motion the Court also refused, holding that the parties being out of the Superior Court, by the withdrawal of defendant's affidavit, plaintiff must proceed with, and on the original writ issued by the Justice of the Peace, and he was entitled only to an order to this effect. To which ruling plaintiff excepted. Whereupon plaintiff tendered his bill of exceptions, assigning as error the rulings and decisions above mentioned.

STROZIER & SMITH, for plaintiff in error.

W. A. HAWKINS, and PERKINS, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

We are called on to construe the act of 1827 (Cobb, 701,) under which the summary proceeding was prosecuted.

The owner of the land demanded possession of the tenant, who, refusing to surrender the premises, the owner made oath that the term had expired, and obtained a recount to dispossess the tenant. It was executed, when

the tenant made a counter-affidavit that he did not hold under the person claiming. The sheriff reported his proceedings to the next term of the Superior Court, an issue was formed, and submitted to the jury, who found against the tenant. He appealed from the verdict; when the appeal came up for trial the tenant was permitted to withdraw his claim, the Court holding, at the same time, that by doing so the whole case was carried out of Court. It also held that an appeal would lie in such a case. In which we think he was right.

But had the tenant the right so to withdraw his claim as to get rid of his liability for double rent, under the statute? We think not. True, he had the privilege to cease to litigate his landlord's right to the premises, which was a confession that he had been wrongfully kept out of them. But, having made himself subject to the penalty of the law for setting up a frivolous claim, and thereby withholding the land from the true owner, he ought not to be allowed, by his own voluntary act, to relieve himself of the consequences.

Under the claim law of 1811, a practice obtained of allowing a claimant to withdraw his claim, and put it in again to his parties. We cannot very clearly see the reason for such a practice. The Legislature of 1821, after reciting that a construction had been put upon the act of 1811, which tended to the manifest injury of the community, and frequently produced not only injustice to plaintiffs in execution, but evidently to oppress and harrass them by the delay of justice, enacted that the claim should be tried at the first term, and claimant was required to give bond, to indemnify the creditor for any damages which he might sustain, and which the jury were allowed to assess to an unlimited amount, *not less* than ten per cent, and the claimant was permitted to withdraw his claim only, (Cobb, 532-533,) and that prior to an appeal, if damages had been assessed.—(8 Ga. Rep., 184.)

Under the rent law of 1827, no bond of indemnity is given, and the only compensation the owner has is, to recover double rent of the tenant. It should not be in the power of the tenant to deprive him of this. With Squatter-Sovereignty, in its political aspects, we have nothing to do. It is evidently not a favorite with our people, as applicable to private property.

HART vs. MCCOLLUM.

If the husband is seized of lands at any time during the coverture, and they have not been conveyed away by him, nor by a public officer, under judicial sale, the widow, at his death, is entitled to dower in said lands.

Dower, in Houston Superior Court. Decision by Judge LAMAR, April Term, 1859.

Abigail M. Hart, as the widow of Levi Hart, deceased, filed her petition to have dower assigned to her, in lot of land No. 9, situated in the thirteenth (13) District of Houston.

The defendant pleaded—

1st. That applicant was not the widow of Levi Hart.

2d. The statute of limitations.

Plaintiff proved her marriage with Levi Hart, the deceased, 15th July, 1818, and that he died in December, 1853. She then introduced and read in evidence a grant from the State to Levi Hart, for the lot in question, dated 12th day of December, 1825, and closed.

Defendant, as color of title, and in support of this plea of the statute of limitations, offered and read in evidence

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a deed from the sheriff of Houston county, for the lot in question, (No. 9, 13th District, Houston county,) to Peter Daniel, sold under fi. fas. from Justices Courts, in favor of John Rawls, against Wm. B. and Job W. Smith, first Tuesday in May, 1832. Deed dated 1st May, 1832. Recorded 18th June, 1832. Also a deed from Daniel to defendant, for the same lot, dated 24th October, 1850, and recorded 25th November, 1850. Also a deed from Jesse Léwis to W. B. and J. W. Smith, dated 20th November, 1830; recorded 26th November, 1830. Then a deed from Benj. E. Hall to Jesse Lewis, dated 27th January, 1829, and recorded 2d June, 1829.

It was admitted by plaintiff's counsel that defendant, and those under whom he claimed, had been in possession of said lot ever since 1830.

Counsel for plaintiff requested the Court to charge, that although the possession of McCollum might be sufficient to bar Levi Hart in his lifetime, yet, that, as he was seized during coverture, his laches did not operate to divest plaintiff's right to dower. The court refused so to charge, but charged the jury that although, by the common law, all that was necessary to entitle a widow to dower was to prove the marriage, and *seizin of the husband at any time during coverture*, and *his death*, yet our legislation had repealed the common law, so far, that if the husband lost title to the land before his death, either by sale, the statute of limitations, or any other way, his widow was not entitled to dower. Under our law, the husband must be seized at his death, to entitle his widow to dower. To which charge plaintiff excepted.

The jury found for the defendant, and plaintiff assigns the charge as error.

JOHN M. GILES, for plaintiff in error.

ELI WARNER, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

It is admitted in the argument, and is undoubtedly true, that the right of dower stood in this State, as it did at common law, until 1826. The colonial act of 1760 (Cobb, 161,) merely ascribed the mode by which the right of the *feme covert* might be conveyed.

By the act of 1826, (Prince, 249,) it is no longer necessary for the wife to join with the husband to bar her dower, except as to the lands of which the husband may have become possessed by his intermarriage. As to all other lands of which he may have been seized during coverture, his separate deed is sufficient to convey the entire title. The legislature, fearing some construction might be put upon the act which would limit the widow's right to lands which come by her, say that nothing contained in the act shall prevent the widow from her right to dower in all lands of which her husband might have been seized. Mortgaged lands would be included under this clause.

One thing is very plain—that while the separate conveyance of the husband is sufficient to transfer the entire title, except as the marriage lands, still to effectuate that object a *conveyance must be made*. And the mere failure of the husband to sue for lands of which he was once legally seized during coverture, until the statute of limitations attaches as against him, does not exclude the wife's right to dower in said lands—a right which she may assert when she becomes discount.

The judges in convention held, and such was the well settled doctrine of the common law, that the statute of limitations did not run against dower.

In confirmation of our constructions of the act of 1826, we refer to the statute of 1842, (Cobb, 179). It is as follows: "All conveyances of real estate made by any sheriff or other officer, in pursuance of sale made under execution or other legal process or order of court, in the life-

time of the husband, shall be as good and effectual in bar of the right of dower as if the conveyance was made by the husband himself.

The act of 1826 having provided that the deed of the husband alone should be good to convey away the wife's rights of dower, the act of 1842 makes judicial sales and conveyances in the lifetime of the husband "as good and effectual in bar of the right of dower as if the conveyance were made by the husband himself." And this is as far as the legislature has gone.

That the legislative policy has been to respect dower, I do not deny. Neither do I find fault with it. On the contrary, I approve of it. That they intended by the act of 1826 to limit it to lands which come by her, and which she had not conveyed jointly with her husband, and lands of which the husband died seized and possessed, is quite probable. Still it is manifest that the acts passed have fallen short of accomplishing that purpose.

To bar her right then, there must be a conveyance by the husband or by the officer of the law under a judicial sale.

We hold, then, that as to the land in dispute, it is only for the widow to show marriage, seizure of the husband at any time during coverture, and death of her husband, and her right to dower is *prima facie* established. The legislation of the State is not in the way in this case.

Judgment reversed.

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McLIN vs. WILLIAMS.

Plaintiff in trover recovered. Pending the action the property was sold under *fi. fas.* in favor of creditors of the defendant in trover. *Held*, That the sale was without authority and void; and, therefore, that neither those creditors nor the plaintiff in trover was entitled to the money raised from the sale.

Motion to distribute money, in Terrell Superior Court. Decision by Judge KIDDOO, at May adjourned Term, 1859.

Robert McLin instituted his action of trover against Matthew E. Williams, for the recovery of a negro woman and child, alleged to be the property of McLin. Pending this suit, the sheriff of Terrell county, by virtue of sundry *fi. fas.* against Williams, amongst other property, levied upon the negroes sued for in the trover suit and sold them. They were sold for \$925. At the May term, 1859, of Terrell Superior Court, the trover action was tried and McLin obtained a verdict against Williams for \$1,557 50. At the same term of the court, and after verdict in the trover case, McLin moved that the sum of nine hundred and twenty-five dollars, the amount in the hands of the sheriff arising from the sale of said negroes, Charlotte and her child Pete, be paid over by the sheriff to plaintiff's (McLin's) attorney. The court overruled the motion, holding that the negroes being sold prior to the recovery in the action of trover, plaintiff was not entitled to the proceeds of said sale, but the same belonged to the older judgments against Williams. To which decision McLin excepted, and assigns error thereon.

W. A. HAWKINS, for plaintiff in error.

WEST, BARON & DAVIS, and DOUGLASS & DOUGLASS, *contra*.

By the Court.—BENNING, J., delivering the opinion.

The questions are two : Were the creditors of the defendant in trover entitled to the money ? or was the plaintiff in trover entitled to it ? The court held that the creditors were entitled to it. We think that neither they nor the plaintiff in trover was entitled to it.

The second section of the act of 1830, "to prevent personal property, which is the subject of an action of trespass or trover, from vesting in the defendant," &c., is as follows : "No judgment obtained against the said defendant, to such an action of trespass or trover, prior in point of time to the said judgment so obtained by the said plaintiff in such action of trespass or trover, shall have any lien or binding force on the said property which is the subject matter of such action of trespass or trover, until after the damages and costs recovered by such verdict, and judgment of the plaintiff in such action of trespass or trover, are first paid off and discharged."—Cobb's Dig., 500.

A judgment that has "no lien or binding force" on a piece of property, is the same as a void judgment, so far as that piece of property is concerned ; and the *fi. fa.* issued on that judgment is, consequently, the same as a void *fi. fa.*, so far as that piece of property is concerned. That *fi. fa.*, therefore, cannot give any authority to the sheriff to sell that piece of property ; and if he still sells it under the *fi. fa.* the sale is merely void, amounting to no more than it would amount to if no such *fi. fa.* existed. These things being so, it cannot be that the plaintiff in the judgment and *fi. fa.* can be entitled to the money arising from the sale.

We think, then, that the court below erred in holding that the general judgment creditors of the defendant in trover were entitled to the money raised from the sale of the negroes, "the subject matter" of the action of trover.

Doe, ex dem. Hanby and Doss vs. Roe, cas. ejec. and Tucker.

Was the plaintiff in trover entitled to the money? Clearly not. His recovery shows that the property sued for was his, and his judgment did not "change the property," or "vest the same," "in the defendant," "except so far as to subject the said property to be sold under and by virtue of an execution" his "judgment."—Cobb, 499. His rights, then, are all against the negroes; he cannot have negroes and money too. He does not offer to waive his rights against the negroes.

What then is to become of the money? That is a question not in the case. I will say, however, that I suppose it to be a question which concerns only the sheriff and the purchaser of the negroes. They have both been guilty of a wrongful conversion of the negroes, which, as the recovery in the trover action shows, belong to the plaintiff in trover. They are both, then, liable to him in trover for the negroes. Besides, the negroes are subject to the judgment in trover. The sheriff, therefore, or the purchaser—one or the other—will have to respond for the negroes to the plaintiff in trover. It would seem, then, but the dictate of justice and equity, that of the two, he that shall be the one so to respond, shall also be the one to take the money.

Judgment reversed.

DOE, EX DEM., HANBY AND DOSS, vs. ROE, CAS. EJ-
ECTOR, AND TUCKER.

If there be a conflict of testimony, and the circuit judge refuses to grant a new trial, this court will not interfere, although, in their opinion, the weight of testimony is against the verdict.

Doe, ex dem. Hanby and Doss vs. Roe, cas. ejec. and Tucker.

Ejectment, in Clay Superior Court. Tried before Judge KIDDOO, and motion for new trial heard and decided at March Term, 1859.

This was an action of ejectment upon the several demises of Absalom Hanby and Azariah Doss, against Sarah E. Tucker, tenant in possession, for recovery of lot of land number 383, in the seventh district of originally Lee, but now Clay, county.

This case was before this court upon exceptions to the rulings and decisions made by the court below, at June term, 1857, and will be found reported in 22d Geo. Rep., p. 132, when the judgment below was reversed and the cause remanded for a new trial.

The case coming on again for trial, at September term, 1858, the jury, upon the proofs submitted, found again for the defendant; whereupon, plaintiff took a *rule nisi* for a new trial, upon the grounds that the verdict was contrary to law and evidence and decidedly against the weight of evidence.

The court refused to make the rule absolute and plaintiff excepted.

E. H. BEALL, for plaintiff in error.

DOUGLASS & DOUGLASS, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

We think the verdict contrary to the weight of evidence in this case; but not so strongly and decidedly so as to authorize a new trial, especially when it has been refused by the circuit judge who presided on the trial of the cause.

We rather think this lot of land has been made without being paid for. Still there is a conflict of testimony; and the jury were probably the best judges as to the facts.

Judgment affirmed.

BROWN & MCCOY vs. DELOACH.

1. A father is bound to pay a debt contracted by his minor child, if he authorized the child to contract it; and a promise by the father to pay the debt, in certain events, is a fact admissible to the jury on the question, whether the father did, or did not, authorize the son to contract the debt.
2. A firm of merchants furnished a minor with goods, consisting of a plated chain, two gold pens and pencil cases, a cassimere suit of clothes, two pairs of kid gloves, and other similar articles, and proved by a witness that "the goods were necessities and suitable to the condition" of the minor. There was no proof that the minor had not, already, a supply of such goods. The father of the minor was sued for the price of the goods. *Held*, That even if a father is bound to pay for necessities furnished to his child, and, even if these goods are such as can be included in the term necessities, yet, that the father is not liable to pay for them, unless it be shown that the child, when furnished with them, was destitute of such goods.

Nonsuit, and motion to reinstate the case. Decision by Judge LAMAR, in Talbot Superior Court, March Term, 1859.

Brown & McCoy brought suit (for the use of Thomas A. Brown) against Simeon Deloach on an account for goods, &c., furnished by said firm to Seaborn Deloach and charged on the books of the firm to Seaborn Deloach.

Plaintiffs introduced as a witness Augustus C. McCoy, who testified that the account attached to the declaration was correct; that the goods were all sold and delivered to Seaborn Deloach, a son of the defendant, and charged to the son on plaintiff's books; that the credit was given exclusively to the son and not to the defendant; that the goods were necessities and suitable to the condition of the purchaser; and that said son was, at the time of the

purchase, under the age of twenty-one years. McCoy also testified, that at the close of the year in which said account was made, defendant came to the store of plaintiffs and paid off his own account. Witness presented him with the account against his son, (now sued upon,) and defendant told witness if he would let the account lie over until the next fall it should be paid. That if his son did not pay it, he would.

Whereupon, defendant objected to so much of the testimony of the witness as went to show any liability or promise on the part of the defendant to pay said debt, and moved to exclude the same from the jury, on the ground that such promise was void by reason of the statute of frauds and perjuries. The promise was admitted to have been a verbal promise. The court sustained defendant's motion and excluded said testimony; to which ruling, plaintiffs, by their counsel, excepted. The plaintiffs having no further evidence, the court, on motion, granted a nonsuit. Afterwards, and during the same term, plaintiffs moved to reinstate their case on the ground that the court erred in excluding said testimony. The court refused the motion, and plaintiffs excepted, and now assigns the said rulings as error.

B. HILL, for plaintiffs in error.

SMITH & POW, *contra*.

Judge STEPHENS absent.

By the Court.—BENNING, J., delivering the opinion.

Was the court below right in excluding from the jury the defendant's promise to pay his son's debt "the next fall," if the plaintiffs would let the debt lie over till then, and the son should fail to pay it? We think not.

If the son's account was contracted by the authority of

the father, it was a contract binding on the father. Anything, then, from which the jury would have been at liberty to infer that the son had been authorized by the father to contract the account, was admissible as evidence to the jury. This promise of the father to pay the account, in certain events, was a thing from which the jury might have inferred that the son had been authorized by him to contract the account, although it was not a thing from which they were bound so to infer. The promise might have been the result of other reasons than a consciousness in the father that he had authorized the creation of the account; as, of a wish to save his son's credit; of a desire to spare his son's sensibilities; of an opinion that the law made him liable to pay the account; but then, as the promise might have been the result of consciousness in him, that he had authorized the creation of the account, the promise was proper matter for the jury—it being the business of a jury, when a fact will bear several different interpretations, to say which one of them it shall bear.

[1.] We think, then, that the exclusion of the promise from the jury was an error.

The ground on which the court put the exclusion, probably, was, that the promise was a promise to answer for the debt of another, and was, therefore, a promise on which an action was forbidden by the statute of frauds. But, if the account was contracted by the authority of the father, the person making the promise, the debt was the father's debt, and not the son's; and, therefore, the promise was not a promise to answer for another's debt, but was a promise to answer for his own debt.

The promise having been excluded from the jury, was the other evidence sufficient to carry the case to the jury, and prevent a nonsuit? That is the next question.

The other evidence, at most, was that of a witness who said, that the son was not twenty-one years old, and that

"the goods were necessities, and suitable to the condition of the" "son." A bill of the goods was attached to the declaration. It is as follows:

MR. SEABORN DELOACH,

Bought of Brown & McCoy.

1854.

Dec. 27—1 plated chain..... 4 00

1855.

April 8—1 gold pen and silver case..... 3 50

" —1 pr. kid gloves, 1 37; May 14, 1 alapaca coat, 6 00..... 7 37½

" —1 pair Ga. shoes, 3 00; 3 yards check linen, 1 50..... 4 50

June 16—1 valise, 4 00; 2 silk cravats, 2 75..... 6 75

July 5—1 pr. white pants, 5 00; Aug. 7, 7 yards gingham, 1 40..... 6 40

" 15—1 gold pen silver case, 2 00; Oct. 1, 1 cassimere suit, 22 50.....24 50

" 1 pr. boots, 8 00; 3 pr. ¼ hose, 1 12½..... 9 12½

Nov. 21—1 pr. Ga. shoes, 3 50; (24) 2 shirts, 4 00.. 7 50

Dec. 20—1 pr. kid gloves, 1 50; 2 collars, 50 2 00

" 24—1 umbrella..... 3 00

\$78 65

Here, then, two questions arise; one, whether a father is bound to pay for necessities furnished to his minor child, but furnished without his authority; the other, whether such articles as those contained in this bill of goods are necessities. The English cases seem to answer the first question in the negative.—Baker vs. Keer, 2 Stark. R., 501; Flenk vs. Torlemache, 1 Car. & P., 5; Blackburn vs. Mackay, 1 Car. & P., 1; Roby vs. Abbott, 6 Carr. & P., 286; Clements vs. Williams, 8 Carr. & Pay., 58; Seaborne vs. Maddy, 9 do., 497; Shellon vs. Springett, 20 English Law and Eq., 28; Mortimer vs. Wright, 6 Mees. & Welsb., 482.

And we very much incline to think that the English cases are in the right. Not that we know of any very general variance in the American cases. Even if a father is bound to furnish his child with necessaries, and fails to do so, that does not impose an obligation on any third person to discharge this duty of the father. If a third person does it, then he does it voluntarily, and what right have voluntary services to expect more than voluntary compensation. If we may, of our own accord, discharge this duty for others, and compel them to pay us for it, why may we not, of our own accord, pay their debts, or discharge any of their other duties for them, and compel them to compensate us for so doing?

But, conceding that a father is bound to pay a third person for necessaries furnished to his child, are such articles as those contained in the above bill of goods necessaries? Surely not. There is not one of them that can be called a necessary. What are necessaries? Food, clothing and lodging, of a cheap style. We may throw in medicine. It is the right of a father, however rich, to bring up his child on a plan of the utmost economy. This right is invaded whenever a third person steps between him and his child, and furnishes the child with such articles as he presumes to deem "suitable to the child's condition in life." The right is outraged when he also requires the father to pay for the articles.—See *Simpson vs. Roberts*, 1 Esp., 17; *Grantz vs. Gill*, 2 do., 471.

But granting that any articles which a witness may consider suitable to a child's condition in life are necessaries to the child, yet that can be true only when the child does not already possess such articles. And there is no evidence in this case that the child did not have a proper supply of such articles as those furnished to him by the plaintiffs in error; and, in the absence of such evidence, it is to be presumed that he did have; for, it is to be presumed, until the contrary be shown, that the father did

his whole duty, and, therefore, that he supplied the child with such articles,—if, indeed, to supply the child with them was his duty.

Upon the whole, then, we think that the evidence, when the father's promise was excluded from it, was not sufficient to support the action, and, therefore, there was nothing in the evidence, as it then stood, sufficient to prevent the court from granting the nonsuit. Still, the granting of the nonsuit was an error, for the reason that the promise was improperly excluded; which, if it had been admitted, would have been sufficient to carry the case to the jury. We must, therefore, order the case to be reinstated.

Nothing need be said of the last exception—that to the refusal of the court to reinstate the case.

Judgment reversed.

CLEMENTS & MILLER vs. LITTLE.

When the verdict is contrary to the evidence, a judgment ordering a new trial ought not to be disturbed.

Claim, tried in Webster Superior Court, before Judge KIDDOO, at March Term, 1859.

Clements & Miller sued out an attachment against Benj. O. Hattox, which was levied upon a negro man named Warwick, as the property of defendant. Little interposed a claim to the property, and the cause coming on for trial, the following was about the substance of the testimony:

On the part of plaintiffs in the attachment it was proved that the negro man was in the possession of defendant, Hattox, prior to and at the time he left the county; that Hattox had had him in possession four or five months; that Hattox left about December, 1857, or January, 1858. Claimant proved that about the 12th June, 1857, he sold said negro to Hattox for the sum of seven hundred dollars, conditionally, to make titles upon the payment of the purchase money. He introduced the note given for the purchase money, which had not been paid, and also the bond for titles which he executed to Hattox. The note was dated, Fort Valley, June 12th, 1857, and was payable ninety days after date to the order of Harvey Little alone, and the bond was of the same date and witnessed by Q. A. Averce, J. P. Claimant likewise proved that about the date of said note and bond he and Hattox were at Fort Valley, and that he had the negro in his possession, and then and there sold him to Hattox, and that the note given for the purchase money had not been paid.

The jury found for the plaintiffs, and claimant took a *rule nisi* for a new trial on the following grounds:

1. Because the court erred in charging the jury that the conditional bill of sale or bond for titles was not of itself sufficient to show title in claimant at and before the date of said instrument.

2. Because the court erred in charging the jury that parol evidence is inadmissible to contradict, add to or alter the written instrument; there being no evidence to which said charge was applicable.

3. Because the court erred in refusing to dismiss the levy, on motion of counsel for claimant, on the ground that plaintiff's proof had not shifted the onus.

4. Because the jury found contrary to the charge of the court, "that if claimant had the negro in his possession at Fort Valley on the 12th June, 1857, and sold him

to Hattox upon condition that the purchase money was to be paid before the title passed, that then claimant's possession was *prima facie* evidence of his title; and if he had no title, Hattox could have none, if he got possession from Little and had not paid the note."

5. Because the court erred in refusing to charge as requested by claimant's counsel, that when a note was payable at bank, it was the custom for the payee or holder to endorse his name in order to enable the banker to collect it.

6. Because the verdict was contrary to law and the evidence and against the weight of evidence.

After argument, the court made the rule absolute and granted a new trial; to which decision plaintiffs excepted.

MCCAY & HAWKINS, for plaintiffs in error.

SCARBOROUGH, represented by B. Y. MARTIN, and SAM. ELAM, *contra*.

By the Court.—BENNING, J., delivering the opinion.

The question is, was the court below right in granting the motion for a new trial? We think that the court was. It is sufficient, if the ground, that the verdict was contrary to the evidence, was good. And that ground was, we think, good.

The evidence showed that Little, being in possession of the slave, sold the slave to Hattox, and bound himself to make title to Hattox, on being paid the purchase money by a certain time; that the purchase money was not paid by that time, or at all; and that Little, thereupon, asserted his title to the slave.

The evidence showing this, what right was there left in Hattox? Either none at all, or, at least, none except on the terms of his tendering the purchase money. And his

Tillman vs. Davis.

creditors could have no further or better right than he had. Neither he nor they tendered the purchase money. Therefore, neither he nor they had any right in the slave sufficient to subject the slave to be sold to pay his debts due to them.

Therefore, the verdict was contrary to the evidence, for it found the slave subject to Hattox's debts.

This ground being good, the motion ought to have been granted. It was granted. It is useless, therefore, to consider the other grounds of the motion.

Judgment affirmed.

TILLMAN vs. DAVIS.

The return of service on the writ, by the sheriff, cannot be traversed, except for fraud or collusion.

Certiorari. Decision by Judge ALLEN, in Lee Superior Court, March Term, 1859.

William J. Tillman brought suit to the January Term, 1858, of Lee Inferior Court, against John A. Dennard and Jonathan Davis, on a promissory note given for rent. Davis lived in the county of Lee, and Dennard in the county of Dougherty. Both parties appear, from the entries on the original and second original declarations, to have been regularly served.

At the July Term, 1858, of said court, a verdict was rendered in favor of the plaintiff, judgment duly entered up, and *fi. fa.* issued.

Davis afterwards moved to set aside said judgment, on the following grounds, to-wit :

1st. That defendant Davis was, in fact, only security to the contract on which said judgment was founded, and signed the same as such.

2nd. That he gave plaintiff notice to sue the principal on said note on or about the first day of January, 1858. That the suit on which said judgment is founded was brought against himself, and said principal within three months after the notice aforesaid, but that said principal was never duly served with said writ; that said principal was not served until *after* the court passed to which the writ was sued. And that, therefore, the court had no jurisdiction of said suit. That Dennard was insolvent. These facts Davis offered to prove to the court.

The court refused the motion, and Davis excepted; whereupon the court also overruled the exceptions, and Davis sued out a writ of certiorari. Upon the hearing of the certiorari at the March Term, 1859, of Lee Superior Court, it was admitted that, since the hearing in the Inferior Court, the interrogatories of C. M. Boynton, the sheriff of Dougherty county, had been taken, and that the sheriff admitted he had not served Dennard within the proper time; that the service was, however, made before the January Term, 1858, of Lee Inferior Court, and by the consent of Dennard, was dated back to the proper time. The court refused to act upon any matter not disclosed by the record from the court below, but sustained the certiorari and overruled the decision of the Inferior Court.

To this decision counsel for Tillman excepted, and now assigns the same for error.

WEST, representing KIMBROUGH & BASS, for plaintiff in error.

VASON & DAVIS, McCAY & HAWKINS, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

Of course, the testimony of Boynton, the sheriff of Dougherty county—taken after the case was decided in the Inferior Court—was properly disregarded upon the hearing of the certiorari. Had that evidence been in, it would have sustained the return of Boynton, the sheriff; and we should have been saved the necessity of inquiring whether the return of that officer, as it stands, can be controverted? The case depends upon the decision of that question. If Dennard was regularly served, as he appears to have been by the return of the sheriff, Davis was concluded by the judgment.

The question has not been adjudicated by this court. It is true that in *Higgs vs. Huson* and others (8 Ga. Rep., 817,) this court said an official return by the sheriff on a *ca. sa.* or *fi. fa.* could not be controverted; and that a party injured by a false return of this sort is remitted to his action against the sheriff. But that point was not really in the case, nor was the judgment of the court put upon that ground.

So in *Parker vs. Jennings* (26 Ga. Rep., 140,) this court permitted a defendant in execution to resist the payment of the *fi. fa.* by affidavit of illegality, where the return was an entry of service upon the writ by the sheriff, that he had left a copy at the defendant's most notorious place of abode; it appearing, or at least being conceded, that the defendant at the time resided in a different county. But the point discussed and decided there was, whether, when the defendant has not been served, he can get rid of the judgment by affidavit of illegality. And the proposition as to the right of the party to traverse the sheriff's return, was not raised or considered.

We shall treat the question, therefore, as *res integra* in this court.

Upon examination, it will be found that the conclusive-

ness of the sheriff's return, both upon mesne and final process, is assumed as one of the axiomatic truths of the law, and the principle is found scattered broadcast throughout the whole of the text books and reports, both in England and in this country, except in the State of Connecticut, where a contrary doctrine has obtained.

"The return of the sheriff," says Baron Comyn, "is of such high regard, that generally no averment shall be admitted against it. As if A. be returned to be outlawed, he cannot say that he was only *quarto* or *quinto exactus*. Kit., 280. If the sheriff return issues upon B., it cannot be averred by A. to save the issues, that his name is not B.—2 Rol., 462, l. 5. If the sheriff in *redisseisin* returns *accessi ad terras*, &c., it cannot be assigned for error, *quod non accessit*.—Leon., 183. If *coronors* make a return, it cannot be said that only *one* made the return.—R. Raymond, 485. If a sheriff returns *scire feci* A. *tenen' un' mess'*, A. cannot plead *non tenet*. R. Cro. Eliz., 872; R. Mod. 10. (Com. Dig. Title Retorn G. 6 vol., 242–243.)

Sheriffs' return not traversable; but you may have an action for a false return.—Loft., 631; Rex vs. Elkins, 4 Burr. 2127; Barr vs. Satchwell, 2 Str., 813.

But I will not multiply citations upon this point. I have investigated carefully in Brooke and Viner's Abridgements, and traced the question to its fountain head, and find it well settled that by the common law no averment will lie against the sheriff's return, and one reason assigned amongst others is, that he is a sworn officer, to whom the law gives credit.—Jenk. 143, pl. 98. There are some exceptions to the general rule in favor of life and liberty, and some modifications made by several ancient statutes. But they are slight and restricted to returns upon particular subjects, and do not affect the present case. It is also true, that while the return of the sheriff, in certain cases, will not be allowed to be contro-

verted in the same action, an averment may be made contrary to the same return in another action.

I lay down another proposition, which seems to be uniform and incontrovertible: that a return of the sheriff which is definitive to the trial of the thing returned, as the return of the sheriff upon his writs, cannot be traversed.—Brooke's Abr. Title Averment; Viner's Abr. Title Return, vol. XIX.

All the American authorities are collected in note (d.) appendix to vol. 2, Cowen & Hill's notes to Phillips on Ev., p. 794, and, as I stated in the beginning of this opinion, with a solitary exception, there is an unbroken array of American cases in favor of the well-established English rule, that as between the parties to the process or their privies, the return of the sheriff is usually conclusive, and not liable to collateral impeachment, except for fraud or collusion; a rule so necessary to secure the rights of the parties, and to give validity and effect to the acts of ministerial officers, leaving the persons injured to their redress by an action for a false return; and that this rule concluding the parties, applied to mesne process, by which the parties are brought into court.

I will not consume time in reviewing the Connecticut cases. Suffice it to say that in *Watson* and others against *Watson*, (6 Conn. Rep., 334). Ch. J. Hosmer, who delivered the meagre opinion of the court, says, distinctly, that it is a general rule of the English common law, that the return of the sheriff is conclusive, both as it respects mesne and final process, there being no distinction made between the two in Westminster Hall. But that in Connecticut a contrary doctrine had prevailed; and that he was unable to assign the precise reason for this departure from the English common law.

This concession is sufficient to satisfy a judge in Georgia what his duty is.

It may be supposed that to make the returns of an offi-

cer, *prima facie* evidence of their truth would be a sufficient security for the rights of the people; and to prevent the perpetration of irreparable wrong. But that is a matter for the legislature and not for the courts.

By the act of 1840 (Pamphlet, p. 40; Hotchkiss, 527,) returns made under oath, by virtue of any rule or order of the court, are traversable. But the legislature has not seen fit to extend the right to the ordinary returns made by a sheriff on processes in his hands. Where they stop, we must stop.

STEPHENS, J., concurred.

BENNING, J., dissenting.

The suit was in favor of Tillman, on a rent note made by two persons, Davis and another,—Davis living in Lee county, the other in Dougherty county. The declarations had on them sheriff's entries to the effect that each defendant was duly served with copies of the declarations.

They were, however, established declarations, the originals having been burnt with the court house, and they had been established, without notice to Davis.

Davis offered to show that the return of service as to the person in Lee was not true; offered to show that the time at which that person was served was after the return term of the declaration. The court decided that he was entitled to show this; and that is one of the decisions excepted to. Was the decision right? A majority of this court think that it was not; I think that it was.

If the return or entry on the declaration for Dougherty county was *conclusive* on Davis, I am wrong; if it was not conclusive on him, I am, I suppose I may say, right.

Was the return conclusive on Davis? If conclusive, why was it conclusive? What principle of law is there which made it conclusive? The principle which makes judgements conclusive on parties and privies to the judg-

ments? Certainly not; parties and privies have notice of the suit, and, therefore, have an opportunity of seeing to it, that the judgment shall be right. Consequently, it is but reasonable to presume, as to them, that the judgment is right. But the parties have no chance to see to it, that the sheriff's return shall be right. He acts in their absence; acts independently of them.

Is it the principle which makes the conduct of a person which has been acted on by another, conclusive on the former? That principle is, that if A. is knowingly guilty of conduct which leads B. to a false conclusion on which B. acts, and acts in such a way that he would be injured, if A. should be allowed to repudiate the conduct, A. will not be allowed to repudiate the conduct. But does that principle apply here? First, Did Davis know that this return was false until he tendered the issue? It does not appear that he did. Secondly, Had Tillman acted on the impression that Davis was sanctioning the sheriff's return? It does not appear that he had. Thirdly, But if Tillman had acted on that impression at all, had he done so in such a way that he would have been injured if Davis had been allowed to open his mouth and object to the return? It does not appear that he had? What had he done? Nothing at all.

What principle, other than these two, is there that promises more than they do towards showing that the sheriff's return was conclusive on Davis? I know of none.

It was argued that it was sufficient for Davis that he would have a right of action for a false return against the sheriff, in which action he would be at liberty to controvert the return. But is it a justification for making a man pay what he does not owe, that his paying it will give him a suit for indemnity against some third person? that is, will give him a *chance* for reimbursement? The sheriff may be insolvent, and so may be his sureties. And

then, how hard may this be on the sheriff or his sureties; how favoring to one entitled to no favor. Suppose this case: A. sues B. on a note to which B. has a good defence. The sheriff serves C. instead of B., but returns that he has served B. A gets a judgment against B., who, knowing nothing of the suit, does not appear to it and put in his defence. *Fi. fa.* is issued against him, and he seeks to open his mouth and say he was not served with notice of the suit. He is ordered to keep it shut and pay the money, and then make the sheriff or his sureties reimburse him. He sues the sheriff, who proves insolvent; he then sues the sheriff's sureties, and, out of them, after a five years' fight, he gets back his money, *minus* lawyer's fees, and loss of time, and loss of the difference between the value of his sold property and the price at which it was sold—to say nothing of trouble and vexation. What is the sum of the matter? It is this: A. has collected from B. money that does not belong to him, A., and that money he will keep. B., after the expenditure of much time, trouble and money, has got back from the sheriff's sureties the money collected of him by A. The sheriff's sureties have nobody to look to but their insolvent principal. So they pocket the loss. The guilty feed on the innocent. How much better would it have been if B. had been allowed in the beginning to open his mouth and say that he had never been served with the declaration. Indeed, this court has expressly held that in such a case B. may show that he was never served.—Parker vs. Jennings, 26 Ga., 140. And such a case does not, so far as I can see, differ, materially, from the present case.

I say, then, that the fact that Davis may have an action for a false return against the sheriff, is no sufficient reason why he should not be allowed, by this issue, to question the return. The plaintiff, Tillman, might equally have the action against the sheriff; and it is more equitable that the action should be put on him, than that it should

be put on Davis, for he, being the plaintiff in the case, it was his work that the sheriff was doing when he made the false return.

It was also argued, that the decisions were in favor of the position, that the return was conclusive on Davis. No decisions, however, were referred to, except some American decisions, cited in the notes to Phillips on Evidence, (4 vol., 1087, *et seq.*) and American decisions are not authority as to what is the law of Georgia. And even these decisions are in conflict. Connecticut holds, that the return to *mesne* process is *not* conclusive. Massachusetts, New York and North Carolina hold, that it is conclusive. (Id. 1089). Most of the cases cited, however, are cases of a return on *final* process; cases which differ from cases on *mesne* process, as in the former the party has at least had his day in court.

But the exceptions which are made in the adverse American decisions are so numerous that they about balance the cases left in the rule, and so, destroy it as a rule. Id. 1089-1090.

If, however, these decisions were all one way, and if they made the rule a rule without an exception, I should still think them decisions not to be followed in Georgia.

First, I do not know, as I have said, of any principle in the law of Georgia which would justify them.

Secondly, The rule they lay down would work unjustly, in every case; very oppressively, too, in some cases; and would be necessary in no case.

Thirdly, The rule would favor instead of oppose estoppels, and estoppels are odious in the law.

Fourthly, The rule is opposed to a decision of this court—the decision of Parker vs. Jennings, (*supra*). True, in that case, it does not appear that the court's attention was called to the question of the conclusiveness of the sheriff's return, but the decision does cover that question, and that question was involved.

Fifthly, We have a statute which makes sheriffs' returns to rules traversable; and this, even although it requires those returns to be made on oath. If a return, even on final process, is, though made on oath, traversable, how much more ought returns on mesne or initiatory process, not made on oath, to be traversable?

Sixthly, There is not, as far as I know, any English decision in favor of the position, that the sheriff's return is conclusive; nor any decision of this court. It is true, that in *Higgs vs. Huson* and others (8 Ga., 321,) it is said "that an official return of this sort, to-wit, an entry of a sheriff on a *ca. sa.* or *fi. fa.* is not traversable." But this was an *obiter dictum*; the case was on an affidavit of illegality, and there was nothing in the affidavit, to raise the question; at least, so thought the court itself, for it says: "This ground of illegality is not in the affidavit, and could not be proven, for that reason." And that *this was so*, was the principal foundation of the decision. Besides, the dictum was made in reference to "a *ca. sa.* or a *fi. fa.*," and our case is a case of original process.

Seventhly, The decisions of the Superior Court, so far as I am acquainted with them, are, that such returns are not conclusive.

On the whole, then, I think, that I ought to dissent from the judgment of the majority of the court. I, therefore, do dissent from that judgment.

WEAVER vs. GARNER ET AL.

An injunction will always be dissolved when all the equity in the bill is fully denied by the answers; and when the reasons for dissolving the injunction, so far as the rights and equities of the parties are concerned, are much stronger than for retaining it.

In Equity, in Clay Superior Court. Decision by Judge KIDDOO, at Chambers, 10th June, 1859.

This was a bill in equity, filed by Shelton R. Weaver against Thomas Garner and others, to enjoin the collection at law of a promissory note of three thousand dollars, given by complainant to Garner, and which, by successive transfers, had come to the hands of Alexander E. Green, who had instituted his action at law for its recovery.

The bill states that this note was given in part of the purchase money of a settlement of land sold by Garner to complainant—the entire purchase money being \$6,000, three thousand of which was paid in cash. That said land, or at least a large and valuable fraction, had been levied on under an execution in favor of William Castleberry against one Thomas J. Watts, as the property of Watts—that said levy had been made at the time complainant purchased said lands from Garner, who undertook and promised to interpose his claim thereto, and in the event that said land was made subject to said execution that he would pay off and satisfy the same—that Garner had left the State and removed to Texas, and abandoned said claim, and that complainant had been compelled to interpose his claim to said premises, and that the same was pending in the Superior Court of Clay county. That Garner and his wife having difficulties had entered into an agreement for a voluntary separation, under which he turned over to her the property which he had received by her upon their intermarriage, and, amongst other things, this note on complainant for \$3,000. That afterwards Mrs. Garner obtained a divorce, and subsequently married William W. Farnum, who received said note from his wife; that one John B. Vanover became interested with Farnum in said note, as part owner of the same, and that finally it came into the possession of Green, who had commenced his action at law thereon.

Green, Vanover, and Farnum and wife, severally answered the bill. The substance of these answers were, that the note had been transferred by Garner to his wife under the circumstances stated in the bill, but that Weaver, the complainant, and who was the brother-in-law of Mrs. Garner, acted as her friend, adviser and agent in the settlement and arrangement of her affairs with Garner, and that he advised her to take said note as a part of the fund or money which Garner had agreed to pay to her, and that he as her agent received said note from Garner and held the same for her until her marriage with Farnum, to whom he turned it over, after their marriage, as part of her estate, and that he at no time made any objection to paying said note, but always asked for indulgence, and never intimated that the same was not justly due, or that he had any defence thereto. That said note had been subsequently transferred and was now held and owned by Green *bona fide*, for valuable consideration and without notice of any defence or equities against it on the part of Weaver, the maker.

Upon the coming in of the answers, defendants moved to dissolve the injunction, which had been granted. After argument, the judge granted the motion and dissolved the injunction; to which decision complainant excepted.

LAW & SIMS, and PERKINS, for plaintiff in error.

STROZIER & SMITH, and HOOD, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

Was the court right in dissolving the injunction in this case? We think so, most clearly.

Not only is the equity of the bill most fully and explicitly denied by the answers of the defendants, but there are strong reasons furnished by the answers why the injunction should not be continued. The rights of the

third persons in the note and which were acquired on account of the representations made by the complainant, Weaver, to them as to the circumstances under which the note was delivered over to Mrs. Farnum before they became interested in it, afford strong ground for dissolving the injunction. There are two facts which operate against holding up this injunction. In the first place, there is great probability that Weaver will succeed in the claim case now pending as to the title to this land. And notwithstanding a new trial has been granted, the chances are that he will hold the land.

Again, it is not alleged in the bill that Garner is insolvent. True, he has removed to Texas; still, under all the circumstances of the case, it is more just that Weaver should follow Garner to a foreign jurisdiction, should he lose the land, than that the rights and equities of Farnum and wife, and Vanover and Green, should be defeated and they be driven to seek their redress abroad against Garner. It is doubtful whether they could assert any claim successfully against Garner, on the faith of the voluntary settlement made between Garner and wife—they were divorced. Could she go behind that divorce and set up any claim to Garner's property? Weaver certainly can go against Garner, should he lose the land. It is doubtful whether Mrs. Farnum can; and if she has been misled in any way, it was by her agent and next friend, Mr. Weaver.

We had some doubt as to the legality of the settlement between Garner and his wife; but that question was elaborately discussed and solemnly adjudicated in the case of Chapman vs. Gray, (8 Ga. Rep., 341).

Judgment affirmed.

MULLIGAN vs. BAILEY.

1. The depositions of a witness cannot be impeached by proof of contradictory statements, which the witness had had no opportunity to explain ; neither can they be impeached by statements of the witness that they did not speak the truth.
2. Possession of personal property cannot be recovered in an action of trover, through a fraudulent title.
3. An unsuccessful attempt to commit a fraud by A. on B., does not justify B. in practicing a fraud upon A.
4. If a charge be inapplicable to the facts, it is no ground of error which will justify a new trial, even if the court mistake the law ; especially where the charge is in favor of the plaintiff in error. The offence of fraud consists in the deception which is practiced ; and this may be done just as effectually when speaking the truth literally, as by uttering a falsehood.

Trover, in Randolph Superior Court. Tried before Judge ALLEN, at November Term, 1858. Rule nisi, for a new trial, heard at May Term, 1859.

This was an action of trover brought by John B. Mulligan, plaintiff in error, against John Bailey, defendant, for a negro man named Dave, alleged to be the property of plaintiff.

Upon the trial, plaintiff introduced in evidence a bill of sale from defendant to plaintiff for the negro, dated 6th April, 1853, whereby, for and in consideration of one thousand dollars, defendant sold said negro and warranted the title. It further appeared, on the part of plaintiff, that he had sold a mare to defendant for some six or seven hundred dollars, for which he held his note ; that when he bought said negro from defendant he gave up said note and gave his note to defendant for the balance, being the difference between the price of the negro and mare. That at the time of the purchase the negro was in pos-

session of one Tucker, to whom Bailey had hired him, and where he continued after the sale by arrangement with Mulligan, until he should be called for. Baily afterwards took possession of the negro and refused to deliver him, and hence the action.

The defence relied upon was, that the trade for the mare and negro was one transaction, and at one and the same time, and that plaintiff practiced a fraud in selling or letting him have a mare, which he represented as "Fanny Clay," a distinguished racer, when in fact he sold to him another mare, known as "Sally Hatch," and of little value in comparison with "Fanny Clay."

The case was submitted to the jury upon the testimony, and charge of the court, who returned a verdict for the defendant, whereupon plaintiff took a rule for a new trial upon the following grounds:

1. Because the verdict was contrary to law and the charge of the court.
2. Because the verdict was contrary to evidence and against the weight of evidence.
3. Because the court erred in admitting the depositions of the witnesses Newberry and Bridwell.
4. Because the court erred in not permitting William Harrison to answer plaintiff's question, "whether or not in a conversation with Benj. F. Newberry he, Newberry, had not stated that his depositions did not speak the truth, and if he did not say that the commissioners had failed to take down his testimony as delivered."
5. Because the court erred in refusing to allow plaintiff to prove, by William Harrison, the statements made to him by Benj. F. Newberry, contradictory of his depositions.
6. Because the court erred in not permitting plaintiff to prove that Newberry stated to witness that his answers did not speak the truth.
7. Because the court erred in charging the jury, that if

they believed that plaintiff perpetrated a fraud upon defendant, even though defendant was attempting to perpetrate a fraud upon plaintiff, then the law would leave them where it found them, and they should find for defendant. And further, that if the defendant was induced by the representations of the plaintiff to believe that he was trading for "Fanny Clay," even though plaintiff may have called her "Sally Hatch," he perpetrated a fraud, and they should find for the defendant.

After argument, the court below refused to make the rule absolute, and plaintiff excepted and assigns said refusal as error.

HOOD, PERKINS & ROBINSON, for plaintiff in error.

DOUGLASS & DOUGLASS, and BEALL, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

It is assigned as error in this case that the court admitted the testimony of Matlick, Newberry and Bridwell, as to the contract respecting the mare, Sally Hatch. The objection assumes that the trades of the mare and of the negro were distinct transactions; hence that this evidence was irrelevant. There is proof, however, that they were one and the same transaction; and one of the objects for which this proof was offered was to show that fact. Of course then it was right to refer the testimony to the jury.

And concede the trades were at different times, and the jury should believe, as they had a right to do, that they were only different acts, in the same drama, the negro trade being but the consummation of the original scheme, in that view of it the evidence was clearly admissible.

Another error complained of is, the rejection of the testimony of William Harrison, who was offered to prove certain statements made to him by the witness Beuj. F.

Newberry, calculated to discredit the depositions of Newberry. This was not the proper way to expose the *mala fides* in the execution of the interrogatories. Why was not Newberry himself re-examined?

As to the charges of the court, we see no evidence in the record that Bailey was attempting to practice a fraud upon Mulligan. If this were so, there was no misdirection in the charge. It was calculated to prejudice the defendant and not the plaintiff. And as to the second charge, it is sound law. A fraud may be as effectually perpetrated by telling the truth as a falsehood; by calling things by their right names as by their wrong names. And the very case put in the charge illustrates the fact.

It is insisted that, in as much as the negro was delivered, the contract was complete as to him; and that Mulligan is entitled to recover possession of him in this action of trover.

Concede that the negro was delivered—though actually he never was—instead of going to Mulligan's when he left Tucker's, where he was hired at the time of the trade, he returned to Bailey; Mulligan, to recover possession of the boy, would have to rely upon his title from Bailey; and if that was void, on account of the fraud with which it was tainted, he must fail necessarily to make out his right of possession.

Whether the verdict is contrary to the testimony it is difficult to say. We are not prepared to say, in the language of the motion for a new trial, that it is so strongly and decidedly against the weight of evidence as to shock the moral sense. Whether the contract for the mare and for Dave was one and the same contract, there is a conflict in the testimony. Whether Mulligan sold Bailey one mare and by artifice, falsely imposed another upon him, the witnesses are not agreed.

This is a transaction which addresses itself peculiarly to the experience of the jury. They knew both the par-

ties and the witnesses, and could best judge between them. They have found for the defendant, and the court has refused to set aside their verdict. It can hardly be expected that we should award a new trial. Solomon said there were four things which he knew not—to which he might have added a fifth: the tricks of a quarter racer. My experience and observations are, that no *horse jockey* is to be trusted in a trade.

It would seem that Bailey having repudiated the contract as fraudulent, ought to return the mare and the money paid him by Mulligan. But we give no judgment upon this point.

Judgment affirmed.

CONEY, ADM'R, vs. SANDERS ET AL.

1. That a power may be a power coupled with an interest, the agent must have an interest in that to which the power relates; it is not enough that he pays a valuable consideration for the power.
2. The fifth section of the act of 1785, which section declares, that sales of lands, made under powers, shall be good, if made before the agent has "notice of a countermand, revocation, or death of the constituent," applies only to powers made out of the State.

Complaint for land, in Lee Superior Court. Tried before Judge ALLEN, April Term, 1859.

This was an action for the recovery of lot of land No. 86, in the first district of Lee county.

Plaintiffs having closed, defendant tendered in evidence a deed from David Hataway, the grantee, and under whom plaintiffs claimed—deed dated in 1841, which purported to be, and was executed by one Simeon Nicholson as the attorney in fact of said David—power of attor-

Coney, adm'r vs. Sanders et al.

ney executed in 1827 or 1828, recited to be made for value received and irrevocable on its face, and by which Nicholson was authorized to sell and convey the lot of land in controversy.

Other evidence was offered, bringing the title down from Hataway's vendee under the deed executed by Nicholson, to defendant.

Counsel for defendant requested the court to charge the jury, that if they believed, from the evidence, that David Hataway, in his lifetime, executed the power of attorney, and it was for value received and made irrevocable, and empowered Nicholson to sell said land, then the deed of conveyance was good and valid, and that, notwithstanding the death of Hataway, if Nicholson, the attorney, had no notice of his death; and that a subsequent purchaser, without notice, held the better title as against plaintiffs, the heirs-at-law of Hataway.

The court refused so to charge, but, on the contrary, charged the jury, that the death of Hataway revoked the power of attorney, and that, whether the attorney had notice of his death or not.

To which charge, and refusal to charge, defendant excepted.

Defendant moved to strike out the amendment to the declaration, making other parties plaintiffs. The court refused the motion and defendant excepted.

MCCAY & HAWKINS, for plaintiff in error.

LYON, IRWIN & BUTLER, VASON & DAVIS, *contra*.

By the Court.—BENNING, J., delivering the opinion.

Was the charge right? We think that it was.

By the common law, a power of attorney is revoked by the death of its maker, unless it be a power coupled with an interest.

[1.] In order that a power may be a power coupled with an interest, the agent must have an interest derived from the power, or, from something else, in the property or thing in reference to which the power was given; that he paid a valuable consideration for the power, will not be enough.—*Hunt vs. Rousmanier's adm'rs*, 8 Wheat. 174.

Neither of these propositions, I believe, was disputed. But it was insisted, that the case fell within the fifth section of the act of 1785, "to render easy the mode of conveying lands," &c., a section which provides, that all sales of lands, made under such powers as it refers to, shall be good, if made before the agent "shall have" had "due notice of a countermand, revocation, or death of the constituent."—*Cobb*, 165.

[2.] But, we think, that this section refers only to powers made in other States than Georgia. It is clear, that the fourth section does; and a little study of the fifth will show, that it means to refer to the same powers to which the fourth had referred. The one section is connected with the other; the object of the fourth is to declare that powers, among other things, made in other States, if proved in a particular way, shall be taken as sufficiently proved. The object of the fifth is, to declare that sales made under those powers shall be valid, if made before the revocation of the powers.

This has been, we think, the uniform construction of the section.

In our opinion, then, it is not true, that the power of attorney in the present case, falls within the section. Consequently, we think, that the charge of the court was right.

As to the refusal to strike out the amendment, it is sufficient to say, that there was an agreement, in writing, between the parties, by which leave to amend the declaration was given to the plaintiffs.

Judgment affirmed.

HAMPTON *vs.* POOL.

A decree for damages in a bill filed for indemnity by a vendor against his warrantor is premature, notwithstanding the eviction of the vendee, it not appearing that the vendor has been actually damaged; he is only entitled to be secured against future loss by his warrantor.

In Equity, in Baker Superior Court. Tried before Judge ALLEN, May Term, 1859.

This was a bill originally filed by Geo. W. Pool against James D. Hampton, to recover the purchase money paid for half of a lot of land sold by Hampton to complainant, and from which he had been evicted by paramount title. Geo. W. Pool dying, pending the suit, David Pool was appointed his administrator, and the cause proceeded in his name.

The bill states that defendant, as trustee of his children, sold and conveyed said land to complainant in 1853, for the sum of \$825, and executed a deed therefor warranting the title, and that complainant went into possession and made considerable improvements thereon. That ejectment suits were instituted against complainant, and one Littleton S. Phipps, who was in possession of the other half of the same lot, for the recovery of said land. That pending suit against complainant, he sold his half of said lot for \$875, and executed to the purchaser a conveyance warranting the title.

The bill further states that afterwards, at Nov. Term, 1856, plaintiffs, in the ejectment cause against Phipps, had a verdict in their favor—their recovery being based upon a grant from the State for the whole lot. That the suit against complainant involves the same questions and

titles, and his suit is now pending on the appeal, and if said suit is decided against him he would be liable for a considerable amount for mesne profits, as well as for damages to his vendee for breach of warranty.

The bill further states that defendant is preparing and intends to leave the State and to remove his property, which he holds as trustee, and prays that a writ of *ne exeat* may issue, &c.

Defendant filed his answer, admitting that he sold the land to complainant as stated in the bill for \$825, and that he went into possession. He admits that suit has been commenced against complainant for said land and was pending at the time the bill was filed; admits that complainant has sold the premises, but avers that the purchaser had notice of the suit and that the titles were in dispute, and submits that said purchaser, as well as the children of defendant, for whom, as trustee, he sold said lands, should be made parties to the bill; avers that he thought at the time he sold that his title was good; admits that he was about removing to Florida when said bill was filed against him, and has since removed to that State.

The case coming on for trial, defendant moved to dismiss the bill for want of equity, for want of proper parties, and because complainant had ample and complete remedy at law.

The court refused the motion and defendant excepted.

Upon the trial, complainant, amongst other things, offered in evidence the record of the ejectment cause against him, showing that since the filing of the bill, said land had been recovered, and his vendee ejected. To which testimony defendant objected, on the ground that said record was not evidence in this case; that especially, so much thereof as contained matter which had transpired since the filing of the bill, was inadmissible. The court

Glisson vs. Carter.

overruled the objection and admitted the entire record, and defendant excepted.

The jury found for complainant \$825 00, with interest thereon since the date of the purchase from defendant.

And defendant thereupon tenders his bill of exceptions and assigns error.

J. E. BOWER, for plaintiff in error.

JNO. LYON, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

We think the case made by the bill and proof did not authorize a decree for damages. Pool has not yet been injured. True, he is in peril, and is entitled to the security which he prays for in his bill, still, until he accounts with Cox, he cannot recover damages of Hampton. With this exception, we see no error to correct in the record.

GLISSON vs. CARTER.

Glisson applied for letters of administration on the estate of Wm. H. Carter. Joseph H. Carter resisted the application; the ordinary decided in favor of Glisson; Carter appealed, and pending the suit, died. The second term after his death—nothing having been done in the case in the meantime—Glisson moved for certain orders in the case, which motion was refused. To that refusal Glisson excepted, and made it the ground of a writ of error.

Held, That the writ of error ought to be dismissed.

Caveat to grant of administration, in Randolph and Quitman Superior Courts. Decisions by Judge KIDDOO.

The facts of this case, as presented in the bill of exceptions, are about as follows :

John Glisson applied to the Court of Ordinary of Randolph county for letters of administration on the estate of William H. Carter, deceased. Joseph H. Carter filed his caveat to this application. The Ordinary granted the letters and Carter appealed. Pending the appeal, Carter, the caveator, died, and upon the case being called at May Term, 1859, counsel for Glisson moved to dismiss the appeal for want of parties, the case having been on the appeal two terms since the caveator's death and no motion made or steps taken to have parties; and also moved to pass an order directing the ordinary to issue letters of administration to Glisson. The court refused both motions, on the ground that the county of Quitman, which had been created pending the appeal, embraced that part of Randolph county in which the intestate resided at the time of his death, and that Glisson also resided in the county of Quitman; and counsel for Glisson excepted.

The court, however, ordered the case to be transferred to the Superior Court of Quitman county, and counsel for Glisson, at the May Term, 1859, of Quitman Superior Court, again moved to dismiss the appeal, and that the ordinary of Randolph county be directed to issue letters of administration to him (Glisson). The court sustained the motion to dismiss, but refused to give direction to the ordinary, and counsel for Glisson excepted.

Counsel then moved the court to pass an order directing the ordinary of Quitman county to issue the letters, which the court refused, and counsel excepted.

DOUGLASS & DOUGLASS, for plaintiff in error.

HOOD, ROBINSON, *contra*.

By the Court.—BENNING, J., delivering the opinion.

Joseph H. Carter, the appellant from the Court of Ordinary, having died pending the appeal in the Superior Court, and no person having been made a party in his place, the first question is, whether the case is properly before this court.

We think that the death of Carter, the appellant, had the effect to abate the suit; or, the effect to suspend it until a new party was made; or, until the proper effort to obtain a new party had proved unavailing.

If the death of Carter had the effect to abate the suit, it carried the suit out of the court below and there remained in that court, no case to be brought to this court. On this hypothesis, then, it is clear that the case is not properly before this court.

If the effect of Carter's death was to suspend the suit until a new party was made, then, it is equally clear that the case is not properly before this court, for no new party was made; and the case was, therefore, in a state of suspension when it was brought into this court, and a case in that state is in a state that does not admit of its being brought to this court.

If the effect of Carter's death was to suspend the case until the proper effort to obtain a new party had proved unavailing, then, still the case is not properly before this court; for no effort at all had been made to obtain a new party. On the hypothesis of a suspension of the suit, the person or persons entitled to be made parties in Carter's place were all such persons as had an interest in the estate on which Glisson was seeking to become administrator,—the estate of William H. Carter. These were, the creditors of William; his next of kin; and the legal representatives of Joseph; for although Joseph's right to claim the administration, for himself, died with him, yet not so did his right to dispute the claim of Glisson to the

administration ; if Glisson was not a proper person to have the administration, it was the right of the legal representatives of Joseph to show it, and to insist that the administration should not be granted to him, but to some person who was a proper person to have it. The creditors and the next of kin of William would have had the right to intervene in the suit, even if Joseph had not died. His death, then, could not affect this right of theirs. No effort had been used to make any of these persons a party. It does not appear that even the death of Joseph had been suggested on the record ; or, that any *scire facias* had been served on his legal representative ; or, that an order had been taken that unless the persons in interest came forward by a named time and caused themselves to be named parties, Glisson would be allowed to proceed *ex parte* with the case. We think that it was necessary that some, or all, of these three things should have been done before Glisson could move in the case. If these had been done, and if they had proved insufficient to get a party in Joseph's place, then, doubtless, it would have been in order for Glisson to move in the case. But, even then, what would have been his proper motion ? To dismiss the appeal ? or, to have the appeal regularly tried ? We rather think the latter. The appeal having been regular, did it not obliterate the judgment appealed from, and put Glisson in the condition of needing a new judgment by a new tribunal ? Be this as it may, we think that Glisson was not in order to proceed in any way with the case, until the steps indicated for getting a new party had been taken. These steps not having been taken, the case was not in a condition to be brought to this court.

Another thing must be mentioned. The case is an *ex parte* case. Can any *ex parte* case be brought to this court ? If so, how is it to be done ? There is no one on whom to serve the bill of exceptions.

All things considered, we think that this case ought to be dismissed, as a case not properly before this court.

Case dismissed.

LAMB & MATHIS, ET AL., vs. RADCLIFF.

A transfer, by an insolvent debtor, to one of his creditors, of his books of accounts, to collect the same, and out of the proceeds, to pay himself, and turn over the balance, if any, to the assignor, is void under the act of 1818. The cases of *Norton vs. Cobb & Crawford* (20 Ga. Rep., 44,) and *Watkins vs. Jenks & Ogden*, (24 Ga. Rep., 431,) re-affirmed.

Certiorari. Tried before Judge WORRILL, Taylor Superior Court, March Term, 1859.

George W. Radcliff brought suit in the Justices' Court of the 807th district G. M., against James L. Brasington, and garnisheed Lamb & Mathis, partners, and one David Golden. The garnishees answered, denying that they had any effects of Brasington in their hands. This answer was traversed; and on the trial of the traverse it appeared that Brasington had, by deed of assignment, transferred his books of account, containing accounts against divers persons, to Lamb & Mathis and David Golden. The accounts amounted to the sum of \$593 76.

The deed of assignment was attached to the book of accounts, and was in the following words:

"GEORGIA, Marion County:

I, James L. Brasington, of said State and county, do hereby transfer all the accounts contained on the aforesaid one hundred and eleven pages, not settled up to this date,

as collateral security to Lamb & Mathis and David Golden, to receive them for what I owe them up to this date; and I also give them the right to sue in my name for their use, or to take notes as they may deem best, and if they take note or notes, the said note or notes are to be counted and considered as money to them, as paid by myself. And as soon as they have collected the amount due each of them, they are then to return the books or notes over to me which is unsettled or uncollected. And if there is not enough on this book to pay what I owe them, I am still bound unto them for the balance that may be due them. They are also to have full control of the day books of this year. And I am not to settle or receive any amount that is on this book, without the said Lamb & Mathis or David Golden is present. And then I am to pay over the same to them, unless it be those whom I may owe, and they owing me which is on this book, and not then unless they or either of them consent to it. Witness my hand and seal, this, the tenth day of November, 1857."

(Signed) "JAMES L. BRASINGTON."

"Test: WM. D. ELAM."

At the March Term, 1858, of said Justices' Court, Radcliff obtained three judgments against Brasington, founded on the notes sued on, which were given in settlement of accounts that were due and owing by Brasington before the date of the deed of assignment.

Brasington was insolvent at the time of making the assignment, and had no other property or effects except said accounts. Brasington was indebted to Lamb & Mathis in the sum of one hundred and forty-seven dollars, and to Golden three hundred and thirty-seven dollars.

The judgment, in the Justices' Court, was that the garnishment should be suspended until the garnishees could collect a sufficient amount to pay themselves what Brasington owed them; and that the balance, if any, should be turned over to Radcliff.

Upon certiorari, the judge of the Superior Court reversed the judgment in the Justices' Court, and ordered a new trial on the ground that the deed of assignment was void; and to this decision counsel for garnishees excepted.

ELAM & OLIVER, for plaintiffs in error.

BLANDFORD & CRAWFORD, for defendant in error.

By the Court.—LUMPKIN, J., delivering the opinion.

We are unable to distinguish this, from the cases of *Norton vs. Cobb*, (20 Ga. Rep., 44,) and *Watkins vs. Jenks & Ogden*, (24 Ga. Rep., 431). This transfer, like the two in those cases, is an assignment *in trust* to a certain preferred creditor by an insolvent debtor; the very thing prohibited by the act of 1818.

Judgment affirmed.

Judge STEPHENS absent, on account of the illness of one of his children.

OLIVER vs. McDUFFIE.

1. An action for or against an infant should be prosecuted or defended in their own name, and they should in all cases appear by guardian.
2. If an infant be liable on a contract for necessities, he is suable at law, and there is no need of resorting to equity.
3. Whether an account for necessities be contracted before or after the appointment of a guardian, can make no difference as to the forum where suit is to be brought.

Demurrer in Marion. Decided by Judge WORRILL, March Term, 1859.

Thaddeus Oliver filed his bill to the February Term, 1855, of Marion Superior Court, against George W. McDuffie. The bill stated that during the year 1850 the complainant followed the business of school teaching, and taught and instructed Isabella Everingham and Mary Everingham, orphans of Lewis Everingham; that their tuition amounted to the sum of forty-four dollars and eight cents; that subsequently the defendant, by the ordinary of said county, was appointed guardian for these minors, and, as such guardian, received into his possession about three thousand dollars; that the defendant, since his appointment, had often admitted the justice and correctness of the account, but refused to pay it, because the services were rendered prior to the appointment.

The defendant demurred to the bill on two grounds:

1st. Because there was no equity in the bill.

2d. Because the case made by the bill showed that the complainant had a clear, complete and adequate remedy at law.

The court sustained the demurrer and dismissed the bill; and complainant excepted and now assigns the same for error.

BLANDFORD & CRAWFORD, for plaintiff in error.

G. O. DAVIS, *contra*.

Judge STEPHENS absent.

By the Court.—LUMPKIN, J., delivering the opinion.

Was the court right in dismissing this bill upon the ground that the complainant had an ample and adequate remedy at law?

The learned judge, in the very able opinion which he has sent up with the record in this case, has established these propositions conclusively; that an infant may

bind himself for necessities, and that education is a necessary (McPherson on infants, 498; Rolf vs. Rolf, 15 Ga. Rep., 457); and that an action at law can be maintained against an infant for necessities. In the case of Nichols and wife vs. Welborn, (13 Ga. Rep., 467,) this court said: "An infant may make a valid contract for necessities; and if she can contract, she can be sued on that contract." That a suit against an infant must be brought against him in his own proper person, and he will defend by his duly appointed guardian, if he have one; otherwise by a guardian *ad litem* to be appointed by the court.—2 Johns, 192. The order for the admission of the guardian to defend the suit should be before plea. If the infant fail or refuse to appear and move for a guardian, the court, at the instance of the plaintiff, will appoint one for him. Tidd Pr. 79; 7 Taunton, 488. And a similar order may be obtained by the plaintiff where the infant defendant does not appear at all.

The infant then being suable at law for his tuition, why then resort to equity? It is argued that a judgment at law could not be enforced. Why not? It is against the infant, and the title to his property being in him and not in his guardian, why should not the lien of the judgment attach?

As to the circumstance that the services were rendered before the appointment of the guardian, what difference can that make? If it be an objection at law, it is equally so in equity. It makes no difference in either case whether the services were rendered before or after the guardian was appointed.

Judgment affirmed.

SATTERWHITE *vs.* BEALL, STEWART & ANSLEY.

The act of 1856, authorizing claims against *trust estates* to be recovered at law, provides for demands only for services rendered the trust estate, or for articles or property or money furnished for the use of *said estate*, and for the payment of which a court of equity would render said estate liable; and the judgment in such cases, has a lien on the *corpus* of the trust property; and is to be enforced by seizure and sale under the execution issuing thereon, as other common law judgments.

Assumpsit, in Randolph superior court. Tried before Judge KIDDOO, at May Term, 1859.

This was an action of assumpsit brought by Beall, Stewart & Ansley, partners, against William J. Satterwhite, trustee for Sarah Satterwhite, on account for goods, wares and merchandise, sold to *cestui que trust*.

Plaintiffs proved the account, and that they kept correct books, and thereupon moved to take averdict for the amount of the account, (\$107 55,) to be paid out of the proceeds of the trust estate after allowing a competent support for the *cestui que trust*. Defendant objected—the court overruled the objection and allowed the verdict to be so taken, and defendant excepted.

Plaintiffs then moved the appointment of a receiver to take charge of said trust estate, until from the proceeds thereof the verdict should be paid and satisfied. To this motion defendant objected. The objection was overruled and the receiver appointed, and defendant excepted.

PERKINS, and ROBINSON, for plaintiff in error.

HARRIS & STEWART, DOUGLASS & DOUGLASS, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

This whole proceeding, from first to last, is founded upon an entire misapprehension of the act of 1856, giving a remedy against trust estates in a court of law; and prescribing the mode of procedure thereon.

In the first place, the claim must be against the *trust estate*, as for blacksmith's work done on the plantation, medical services rendered the trust negroes, &c., and not for a demand against the *cestui que trust*, such as this is.

Again; the judgment binds the *corpus* of the trust estate and is a lien thereon, and is to be enforced by levy and sale of the property itself. In other words, it is in all respects a proceeding *at law*, to collect claims of one class only, namely, such as accrue from benefit done to the trust estate in its preservation, maintenance, &c. The appointment of a receiver, therefore, to pay the judgment out of the rents, issues and profits, is wholly foreign to the statute, and the object for which it was passed.

Judgment reversed.

PATTERSON vs. CLARK.

A mortgage creditor receives from his debtor different sums from time to time to forbear foreclosing his mortgage. *Held*, That such contracts are forbidden by the spirit and policy of our laws against usury.

Foreclosure of mortgage, in Sumpter superior court. Tried before Judge ALLEN, April Term, 1859.

This was a proceeding to foreclose a mortgage. Plaintiff offered and read in evidence his mortgage and notes, and closed.

Defendant tendered and read in evidence the answers of plaintiff to interrogatories exhibited to him, in which plaintiff admitted the payment by defendant of twenty dollars, forty dollars, twenty-five dollars and twenty dollars, at different times, and which were not credited on the note or mortgage, not being made in part payment thereof, but paid for forbearance on plaintiff's part to foreclose said mortgage at the several times, these amounts were paid, and that such was the agreement at the time.

The court charged the jury that an agreement to pay money for forbearance to foreclose a mortgage was void and usurious, and such payments were to be credited on the note or mortgage as part payment thereof.

Plaintiff requested the court to charge, that if the payments were *bona fide* made for forbearance to foreclose and not as usury, and that this was done *bona fide* to prevent suit and foreclosure, and not a mere device to evade the usury laws, then the payments were good and not usurious. The court refused so to charge. To which charge and refusal to charge plaintiff excepted.

The jury found only twelve dollars for plaintiff as the balance due on his note secured by the mortgage. And plaintiff excepted.

McCAY & HAWKINS, for plaintiff in error.

SCARBOROUGH, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

We see no difference in principle between this case and *Troutman vs. Barnett and others*, (9 Ga. Rep. 80.) Indeed, this is the stronger of the two.

There a note was given to the judgment creditor to obtain indulgence; and this court held that the contract was usurious and limited the judgment itself in the hands of the assignee. Here payments were made from time to time to the mortgage creditor to forbear to foreclose his mortgage. We are clear that this transaction is within the spirit and policy of our laws against usury. It is a mere shift or contrivance to extort usury, and there is no condition in which a necessitous debtor can be placed to make him bleed more freely. He is threatened from time to time with the screw; and to procure temporary respite, twenty, twenty-five, and forty dollars are paid.

It is said that the agreement here was not to forbear suing generally, but to foreclose the mortgage. I know not that this would make any difference. But we understand that it was tantamount to a contract not to sue. Otherwise the creditor would get a general judgment and sell the mortgaged property about as soon as he could have foreclosed. But the debt being the same, what difference does it make whether the usury was paid for the one or the other?—it equally vitiates the contract.

With the policy of usury laws, we have nothing to do. Nor will we say in the quaint language of the old writers that such contracts are sacrilegious—that it is eating the creditor's bread in the sweat of his debtor's brow—that it is ploughing on sunday. But all such contracts are forbidden by the law; and this is enough for the courts to know.

Judgment affirmed.

COX ET AL. vs. MECHANICS' SAVINGS BANK.
BURKE ET AL. vs. SAME.

1. The acceptor, drawer and endorsers of a bill of exchange, payable at a bank, are not subject to be sued in the same action.
2. Demand of the *drawer*, and notice of his failure to pay, given to the acceptor, are not necessary to charge the acceptor, even, although he may be an acceptor for the accommodation of the drawer.

Complaint, in Stewart superior court. Tried before Judge KIDDOO, April Term, 1859.

The facts in these two cases being the same, they were heard and determined together.

The first was a case brought by the Mechanics' Savings Bank, against Cox as acceptor, and John A. Tucker as drawer and endorser of a bill of exchange; the other was against Burke as acceptor, and Tucker & Beall as drawers and endorsers.

Plaintiff introduced the bill in evidence and closed. The following is a copy of the bill:

LUMPKIN, Aug 12th, 1857.

Ninety days after date pay to my order at the agency of the Mechanics' Savings Bank of Savannah, at Lumpkin, Geo., five hundred dollars.

To J. M. Cox. (Signed,) JOHN A. TUCKER.

Endorsed by Tucker and accepted by Cox, the drawee for accommodation.

Defendants moved for a non-suit, on the ground that the acceptor and endorser could not be joined in the same action, the bill being made payable at a bank agency. The court refused the motion and defendant excepted.

Defendants then requested the court to charge the jury, that before the plaintiff could recover against the accep-

tors, being accommodation acceptors, there must be proof of demand of the drawer and notice. The court refused so to charge, but charged the jury that it was not necessary in these cases for the plaintiff to prove demand and notice, and defendants excepted.

The jury found for the plaintiff, and defendants filed their bill of exceptions, assigning said rulings and charges and refusals to charge as error.

E. H. BEALL, and B. H. HARRISON, for plaintiffs in error.

WIMBERLY & REDDING, *contra*.

By the Court.—BENNING, J., delivering the opinion.

Did the court err in refusing a non-suit in these cases? We think so. The bills of exchange are not within the act of 1826, (Pr. Dig. 462.) The question whether the acceptor and the drawer and the endorser were subject to be joined in the same action, is, therefore, a question to be determined by the common law. And by the common law they were not subject to be sued in the same action—they not being joint promissors—and their joinder was good, even in arrest of judgment.—14 Ga. 691; 18 do. 517.

1. We think, then, that the court ought to have granted the motion, unless the plaintiff had chosen to amend the declarations, by striking from each all the defendants except one.

2. There is no rule of law which makes a demand of the *drawer*, and a notice of his failure to pay necessary to charge the *acceptor*, even, although the acceptor may be an acceptor for the accommodation of the drawer. The promise, even of an accommodation acceptor, is to pay in the first instance—is to pay on demand, at the maturity of the draft. We find, then, nothing amiss in the charge.

Judgment reversed conditionally, *i. e.*, unless the plaintiff will amend the declarations by striking from each of them all of its defendants except one.

BROWN & CARMICHAEL vs. WAY & TAYLOR.

The return of service on a writ by the sheriff cannot be controverted except for fraud or collusion.—See *Tillman vs. Davis*, decided at the present term.

Complaint and bail, in Sumter county. Decision by Judge ALLEN, April Term, 1859.

Way & Taylor brought suit against Brown & Carmichael, partners in trade, on an account, and filed their affidavit for bail. Brown resided in the county of Sumter and Carmichael in the county of Dougherty. The sheriff of Sumter county returned that he had served Brown by leaving a copy at his place of residence, that being absent he could not arrest him under the bail process. Carmichael was arrested by the sheriff of Dougherty county and gave bond for appearance as provided by law.

At the trial, counsel for defendant moved to dismiss the action on the following grounds:

1. Because Brown, at the time of the commencement of said suit, having left and departed from the State, the return made by the sheriff as to him, was false.

2. Because the suit being upon an account, defendants were not *joint and several obligors*, and did not come under that provision in the Constitution authorizing suits to be brought out of a defendant's county, and that Carmichael

being a resident of Dougherty county, could not be sued out of that county.

8. Because the process is void, it bearing a date subsequent to the return day of the court to which it was returnable.

The court overruled the motion to dismiss and allowed plaintiffs to amend the process, and defendants excepted.

McCAY & HAWKINS, for plaintiff in error.

SCARBOROUGH, and LYON, IRVIN & BUTLER, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

The return of service by the sheriff on a writ cannot be controverted, except for fraud or collusion. Such was the opinion of this court in the case of Tillman vs. Davis, decided during the present term; and notwithstanding the nature of the service in the two cases was different, still, we consider this case fully controlled by that.

STEEHENS, J., concurred.

BENNING, J., dissenting.

I think the sheriff's return was traversable—that it was not conclusive on Carmichael. My reasons for this opinion, are the reasons which I had for dissenting from the judgment of this court in Tillman vs. Davis, decided at the present term. Therefore, I shall not repeat them here, but merely refer to them there.

EPPS ss. DEAN.

1. If the testator makes a deed to the property which he has bequeathed by his will, the act amounts to a revocation of the will, and it may be pleaded in bar to the probate of the will.

Caveat to will, in Harris superior court. Tried before Judge WORRILL, April Term, 1859.

A writing, purporting to be the last will and testament of Elizabeth Holcomb, deceased, was propounded for probate in the court of ordinary of Harris county; and a caveat to the same was filed by Seaborn L. Dean, the son, and heir at law, of deceased, upon the grounds—

1st. That said paper writing, purporting to be the last will and testament of Elizabeth Holcomb, deceased, if signed by her, was subsequently revoked.

2d. That said will was procured by undue influence.

3rd. That the deceased was of unsound mind and memory at the time of executing the paper.

4th. That deceased was ignorant of the contents of said alleged will.

The ordinary pronounced in favor of the propounder, and ordered said paper to record and probate as the last will and testament of Elizabeth Holcomb, deceased, from which judgment caveator appealed.

The cause coming on for trial on the appeal at the April term, 1859, of Harris superior court, propounder proved the due execution of the will, by the subscribing witnesses thereto, and that deceased was of sound mind at the time. He then offered and read in evidence, the will dated 1st October, 1853, and closed.

Caveator then, amongst other things, offered and read in evidence four deeds, executed by deceased after the

execution of the paper propounded as her will, in and by which deeds, she, for and in consideration of natural love and affection, conveyed the same property contained and mentioned in the alleged will, to others.

The testimony being closed, after argument, the presiding judge, among other things, charged the jury, that if the proof showed that deceased, after the execution of the paper propounded as her will, executed deeds conveying all the property mentioned in or disposed of by it, the same amounted to an entire revocation of said will, and they should find for the caveator; and if the proof showed that she had conveyed by said deeds only a part of the property disposed of in and by said will, that amounted to a revocation *pro tanto*, and to that extent they should find for the caveator; and as respects the remainder of the will they should find for the propounder.

To which charge counsel for propounder excepted.

The jury found for the caveator generally; whereupon counsel for propounder tendered their bill of exceptions, and assigned for error,

1st. That the court erred in charging the jury as above stated.

2d. Because the verdict was contrary to law and evidence.

3rd. Because the verdict was contrary to the charge of the court, "that if they, the jury, should find that said will was revoked in whole or in part by said deeds, their verdict should ascertain and state what part, to what extent, and whether a whole or a part had been revoked, according as they should find, on a comparison whether any or all of the property named in the will, was or was not the same as that named in and conveyed by the deeds."

MOBLY, THOMAS, and DOUGHERTY, for plaintiff in error.

RAMSEY & CARUTHERS, *contra*.

By the Court.—BENNING, J., delivering the opinion.

There can be no doubt, that if a testator makes a deed for the property which he has bequeathed by his will, the act amounts to a revocation of the will. Why, then, should not such an act be pleadable in the court of ordinary as a bar to the establishment of the will? An appeal to the superior court, and to a jury, will lie from the decision of the court of ordinary. Similar matters are pleadable in the court of ordinary; as the execution of a later will; the execution of a naked revocation; the cancellation of the will; the marriage of the testator, or his having a child subsequently to the making of the will. (Cobb 347.) The case of Finch vs. Finch, was a case in which the matter pleaded in bar to the establishment of the will, was an agreement made by the legatees among themselves. No act of theirs could revoke the will.

1. For aught that we can see, then, the charge of the court below was right.

We see nothing to justify disturbing the verdict.

Judgment affirmed.

TUCKER vs. DAVIDSON.

1. A *ca. sa.* bond is intended only to secure the appearance of the debtor. If he surrenders himself at court or is delivered up by the sureties, the bond is discharged.
2. A *ca. sa.* bond, with a condition, "that the debtor appear and abide by and perform the judgment of the court in the premises," is a valid bond.
3. A *ca. sa.* bond payable to the sheriff instead of the plaintiff, is good; and the court will compel the officer to assign the same.

Tucker vs. Davidson.

A *capias ad satisfaciendum* issued from the superior court of Baker county at the instance of William H. Davidson, against Walter B. Mason. He was arrested by plaintiff in error, the deputy sheriff, who took a bond conditioned for his appearance "*at the superior court to be held in and for said county, on the second Monday in May next, then and there to abide such other and further decree or order of said court as may be made in the premises.*"

At the May Term, 1859, counsel for plaintiff in *ca. sa.* took a rule nisi against the deputy sheriff to show cause why he should not pay over to plaintiff the amount of principal and interest due on said *ca. sa.*, on the ground that the bond taken of defendant was not in conformity with the statute in such case made and provided, in this, first, that it was made payable to the sheriff; secondly, that the condition was not in pursuance of the statute, and was such that no judgment could be entered against the principal and his surety for a breach thereof.

It appeared that the defendant did not appear at the term to which the *ca. sa.* was returnable, and that he filed no schedule nor gave any notice or took any steps to take the benefit of the Honest or Insolvent Debtor's Act.

Upon hearing the answer of the deputy sheriff, and after argument, the court made the rule absolute, and defendant excepted.

STROZIER & SMITH, for plaintiff in error.

LYON, IRVIN & BUTLER, *contra.*

By the Court.—LUMPKIN, J., delivering the opinion.

Was the court right in holding that the bond taken by the deputy sheriff in this case, was void and compelling the officer to pay the debt? We think not.

A *ca. sa.* bond is intended only to secure the appearance of the defendant. If he surrenders himself at court, or is

delivered by his securities, the bond is discharged. This bond obligated the debtor to appear and abide by and perform the judgment of the court in the premises. If he failed to appear, as he did, the condition of the bond was broken, and the securities were liable. Had he appeared and failed to get a discharge under the insolvent debtor's act, he would have been ordered into custody, there to remain until the debt was paid, or at least until a full surrender was made of all his effects. The securities, in the mean time, would be exonerated. We repeat, then, that the undertaking of the securities is for the appearance of the principal and nothing more.

As to the bond being payable to the sheriff instead of the plaintiff in *ca. sa.*, the sheriff takes the bond for the benefit of the creditor. He could be compelled by the court to assign. Here he voluntarily offered to do so.

Judgment reversed.

BOND vs. WHITFIELD, ADM'R.

Under the act of 1856, notice of a proceeding to establish a lost or destroyed paper, must be served *personally* on the party, if to be found within the State; and if not, published in some public gazette within the State for the three months; and if a party residing out of the county be served by leaving a copy at his residence, the proceeding is void. If the proceeding be against the drawer of a draft, the acceptors should be made parties.

Complaint, in Baker superior court. Tried before ALLEN, Judge, at May Term, 1859.

This was an action by Matthew Whitfield, administrator of John Tompkins, deceased, against James Bond,

Bond vs. Whitfield, adm'r.

on a copy draft, which had before been established by proceedings had for the purpose, in lieu of the original which was lost.

The following is a copy of the draft sued on :

“\$2644 81.

ALBANY, GEO., March 26, 1857.

On the first day of December next please pay to estate of John Tompkins or order, twenty-six hundred and forty-four dollars and 81 cents, value received and charge to account of

Yours, respectfully,

JAMES BOND.

To Messrs. SIMS & CHEEVER, Albany, Ga.”

With the following endorsements :

“Sims & Cheever.”

“Noted for nonpayment, Dec. 4th, 1857.”

“Protested, Dec. 5th, 1857, by G. Rush, Not. Pub.”

Before going to the jury with the case, the defendant filed a plea to the jurisdiction, on the ground that he did not reside in Baker county at the commencement of the suit, but that he then resided, and now resides, in the county of Muscogee.

Plaintiff demurred to this plea, on the ground that it was not filed at the first term of the court, nor was the same sworn to by defendant. The court sustained the demurrer and ruled out the plea, and defendant excepted.

Plaintiff then tendered in evidence the record of the proceedings establishing the lost draft, containing a copy of the note established—the petition for the same, wherein Mathew Whitfield, as administrator aforesaid, was plaintiff, and James Bond was defendant, and the entry of the sheriff thereon that he had served “James Bond with a copy of the within by leaving a copy at his most notorious place of abode, 20th April, 1858;” and the judgment establishing the copy draft attached in lieu of the lost original.

Defendant objected to the introduction of this evidence on the following grounds :

1st. Because plaintiff showed no title to the original draft or bill.

2d. Because the original draft of which the paper exhibited purported to be an established copy, was void as a draft or bill, not being payable to any person.

3rd. Because the paper exhibited was not a copy of the original draft established in terms of the statute in such case made and provided, so as to charge defendant thereon, without further proof of the existence of the original.

4th. Because the judgment establishing said copy draft was improvidently granted and void, for this, that the acceptors thereof, Sims & Cheever, were not made parties to the proceeding or cause in which said judgment was rendered—had no notice of the same, and no reason given why they were not made parties, and the paper was established as to them as well as to defendant.

5th. Because said copy draft had not been established in lieu of the original lost, as provided by law, so as to be evidence of a debt as against the defendant.

It was admitted that the acceptors, Sims & Cheever, at the time of the proceeding to establish the copy draft, did not reside in Baker county, but that they did then, and now reside in the county of Dougherty.

After argument, the court overruled the objection on all the grounds taken, and admitted the record in evidence, and defendant excepted.

The jury found for the plaintiff the full amount of the draft; whereupon defendant tenders his bill of exceptions and assigns as error the rulings and decisions above excepted to.

LYON, IRVIN & BUTLER, for plaintiff in error.

VASON & DAVIS, *contra*.

By the Court.—LUMPKIN, J.; delivering the opinion.

When the exemplification was tendered in evidence, in this case, it was objected to, 1st, because the defendant had not been properly served with notice of the proceedings to establish the lost paper; and, 2dly, because the acceptors should have been made parties.

By the 2d § of the act of 1856, (Pamphlet 338,) it is required, that the rule Nisi, to establish lost or destroyed papers, should be served personally on the party, if to be found within the State; and if not, published in some public gazette of the State for three months.

In this case, neither of these statutory requirements was complied with. A copy of the rule was left, as the sheriff certifies, at the notorious place of abode of the defendant; which was out of the county where the proceeding was instituted.

This cannot be considered served under the law, and consequently, the whole proceeding is void.

If this were a proceeding in chancery, there could be no doubt but that the acceptors would have to be made parties. Is there any reason why they should not be in this common law proceeding, which is substituted for that in chancery? The mode pointed out for effecting service, seems to contemplate that some of the parties will reside out of the county. We see no constitutional objection on the score of residence to making the acceptors parties.

Judgment reversed.

CARAWAY vs. SMITH.

1. A nuncupative will was in these words : " He settles by will, James, Sukey, and Emily, on Mrs. Mary Ann Caraway, and the natural heirs of her body, after her death." *Held*, That the negroes vested absolutely, in Mrs. Caraway.
2. In a claim case, the defendant in fi. fa., was examined as a witness, by the plaintiff, without objection by the claimant. *Held*, that such examination was not a ground for a new trial.

Claim, in Talbot superior court. Tried before Judge Worrill, at March Term, 1859.

By virtue of an execution in favor of Levi B. Smith, executor of James Stanford, deceased, against William Caraway, the sheriff of Talbot county levied on a negro man, named James, as the property of defendant. Caraway, as the legally appointed guardian of his infant children, interposed a claim, alleging that said negro belonged to them, and was not subject to said fi. fa. against him. Issue was joined and the following testimony introduced :

William Caraway, the defendant in fi. fa., and guardian claiming the negro, introduced by plaintiff, and without objection on the part of his, Caraway's, counsel, testified, that the boy Jim, was received by him from Levi B. Smith, the executor of the last will and testament of James Sandford, deceased, for his wife, the daughter of testator, in the year 1853, and that he so held him for her until her death in 1856. That he had been appointed guardian of her children, since her death, by the ordinary of Upson county, and that he held said negro as guardian of said minor children. That the negro Jim levied on, is he negro "James" mentioned in the third item of the nuncupative will of said James Sanford, and that he had been in witness' possession from the death of James Sanford up to the time of the levy.

Caraway vs. Smith.

The 3d item of the nuncupative will of James Sanford is as follows :

"3. He settles by will *James*, *Sukey*, and *Emily* on Mrs. *Mary Ann Caraway* and the natural heirs of her body after her death."

In the last paragraph *Levi B. Smith* is appointed executor.

The testimony being closed, the court held and charged that under the above clause of said will, the negro, *James*, vested absolutely in Mrs. *Caraway*. The jury found the property subject to the execution, and claimant moved for a new trial on the following grounds :

1st. Because the court erred in refusing to dismiss the levy, moved for by counsel for claimant, upon the ground that there was no evidence showing that the title, in the negro levied on, was in the defendant in *fi. fa.*

2. Because the court erred in holding that the will of *James Sanford* vested an absolute title, to the slave levied on, in his daughter *Mary Caraway*.

3. Because the verdict is contrary to the evidence and without evidence.

4. Because the verdict is contrary to law.

5. Because the court erred in allowing the defendant, *Caraway*, to testify on the part of plaintiff in *fi. fa.*—no objection being made at the time or during the trial.

The court overruled the motion and refused to grant a new trial, and claimant excepts, and assigns error.

JAMES M. SMITH, and *A. G. PERRYMAN*, for plaintiff in error.

SMITH & POW, *contra*.

By the Court.—*BENNING, J.*, delivering the opinion.

1. There can be no doubt that the charge was right. *Childers vs. Childers*, 21 Ga. 377. .

2. This decides all the questions in the case except one—the plaintiff's examination of defendant in *fi. fa.* as a witness. This the plaintiff did without objection from the claimant, until after the verdict. The objection was then too late; the claimant had waived it.

Judgment affirmed.

BERRY ET AL. vs. COOPER AND BOYKIN, EXRS.

1. The amendatory act of 1853-'54 did not intend to subvert the order of pleading, so as to admit a dilatory plea to be filed, after the case had been tried upon its merits and was pending on the appeal.
2. By way of establishing a usage in shipping on a certain river, it is competent for a witness to testify as to what has been his habit and custom in shipping on all the boats on said river, as well as on the particular boat upon which the loss occurred which is the subject-matter of controversy.
3. To make a usage good, it must be known, certain, uniform, reasonable, and not contrary to law; and if boats on a particular river, or a particular boat on that river, sometimes gave bills of lading containing an exemption from loss by fire, and at other times, bills of lading containing no such exemption, then no such usage is established, for want of uniformity. And even if in a majority of cases, bills of lading contain such clauses of exemption, still the usage is not sufficiently proven as to make it the law of the contract between the parties.
4. Common carriers, cannot by any special contract, exempt themselves from liability from losses arising from negligence.
5. When there is a special exemption as to loss by fire, the onus of showing, not only that the cause of the loss was within the terms of the exception, but also that there was no negligence, lies on the carrier.
6. Where cotton is shipped through an agent for that purpose, he is authorized to bind his principal according to law. In the absence of proof to the contrary, the general law of common carriers, is the

Berry et al. vs. Cooper and Boykins, Ex'rs.

power under which the agent acts. If a usage be sufficiently established, that will govern, because it is presumed to be known to the parties. And this presumption is conclusive upon the principal, whether it is known to the agent or not. But a custom known only to the agent and which is not so established, as to make it the law of the contract otherwise, will not bind the principal. The knowledge of the agent is not the knowledge of the principal in this case. In other words, if he acts upon his private knowledge, he exceeds his authority, and does not bind his principal.

Case, in Muscogee superior court. Tried before Judge Worrill, at November Term, 1858. Motion for new trial, decided at May Term, 1859.

This was an action by the executors of Doctor Samuel Boykin, deceased, against Thomas Berry and others, owners of the steam-boat Franklin, to recover the value of one hundred and thirty-four bales of cotton, shipped on said boat and destroyed by fire.

This is the second time this case has been before this court.—See 21 Vol. Geo. Rep. p. —, where the facts will be found fully stated. The judgment of the court below was then reversed and the cause remanded for a new trial. Upon the second trial, the jury found for the plaintiffs eight thousand one hundred and seventy-four dollars and eighty-one cents (\$8,174 81.) Whereupon defendants moved for a new trial upon the following grounds, viz:

1. Because the court erred in striking the plea of Alfred Prescott, one of the defendants.

2. Because the court erred in admitting that part of Belisle's testimony, in which he stated that the captain handed him a *bill of lading*.

3. Because the court erred in ruling out the testimony of William H. Harper, offered to show his, Harper's, custom and habit in taking bills of lading, for cotton shipped on all the boats on the river, by which he shipped, containing exceptions from loss by fire.

4. Because the court erred in ruling out the testimony

of W. H. Harper, showing his uniform custom, for several years, in shipping by the Franklin, to take bill of lading containing the exemption of loss by fire.

5. Because the court erred in charging the jury, as requested by plaintiffs' counsel, that if they believed from the evidence, that steam-boats on the Chattahoochee river sometimes gave bills of lading, for cotton, containing the exemption from loss by fire, and at other times bills of lading without such exemption, that then, no usage is established. The court having before charged, that to make a usage good it must be established, known, certain, uniform, reasonable, and not contrary to law.

6. Because the court charged the jury that if they believed from the evidence, that the steam-boat Franklin, sometimes gave bills of lading containing the exemption from loss by fire, and at other times gave bills containing no such exemption, then no usage by said boat is established.

7. Because the court charged the jury that if they believed, from the evidence, that the boats on the Chatahoochee river, in a majority of instances, gave bills of lading containing exemption from loss by fire, yet if they in many instances gave bills of lading containing no such exemption, then no usage is established.

8. Because the court erred in charging the jury, that if, from the evidence, they believed the steamer Franklin, received the cotton as common carriers under a contract by which her owners were exempted from loss by fire, and if the cotton was not delivered, but was burnt on the boat, still the plaintiffs are entitled to recover, unless there was on the part of the defendants no negligence or want of due care, and the onus of proof of this fact lies on the defendants.

9. Because the court erred in refusing to charge, as requested by defendants' counsel, that if the proof showed

that it was the custom of the boats on the Chattahoochee river to give bills of lading exempting them from loss by fire—that the custom was certain, well established, and known to Wm. H. Harper, (plaintiffs' agent in shipping the cotton,) and that the clerk of the boat offered to give Harper such a bill of lading, and Harper waived it, then the jury may infer an agreement of exemption from damage by fire.

10. Because the court erred in refusing to charge, as requested by defendants' counsel, that if the proof shewed that Harper gave the instructions to Creighton, the clerk of the boat, to leave the receipts to shew the number of the bales taken, the jury might presume that the parties did not intend that paper or receipt to contain the contract.

After argument, the court overruled the motion for a new trial, and counsel for defendants excepted, and assign said refusal as error.

W. DOUGHERTY, and B. A. THORNTON, for plaintiffs in error.

JOHNSON & SLOAN, and NISBETS, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

All the grounds of error in this case, are set forth in the motion for a new trial; and for the overruling of which this writ of error is prosecuted.

1. The question made in the first assignment is, whether, under the act of 1853-'54, allowing either party to amend his pleadings at any stage of the case, a plea in abatement can be put in upon the appeal, and after a trial upon the merits?

We are clear that the act was intended to authorize no such practice. It was designed to expedite litigation,

and not to retard it. The legislature never contemplated subverting the whole order of pleading, and such is the construction which this court has heretofore put upon the statute, (*Kendrick vs. Whitfield*, 20 Ga. Rep. 379-380.)

Dilatory pleas may be amended so long as they have a stage in the proceeding. But after a plea in bar or a plea to the merits, dilatory pleas have no longer a stage in the proceeding; and are no longer amendable. Nor does the case of *Robinson vs. Wilson*, (19 Ga. Rep. 505,) conflict with this view. True, under the act of 1836, a plea of partial failure of consideration could only have been made at the first term, and we held that under the act of 1853-54, (*Pamphlet*, p. 48,) it might be put in by way of amendment afterwards. But that was a plea to the merits, and which, but for the act of 1836, had a stage in the proceeding up to the final trial. We held that the act of 1853-4 was a virtual repeal of this provision in the act of 1836. The reason for which I never could comprehend, unless the legislature, supposing that they were permitting the party to avail himself of matter by way of defence, for which before he had to resort to an independent action, he should give the plaintiff notice of it at the earliest opportunity.

For myself, I must say, once for all, that I am weary of hearing the act of 1853-4 continually denounced by the Bar. It is a most salutary act, calculated, as I have already said, not to hinder and delay but to promote and expedite justice; and to aid in its administration. The fault is in the courts in not executing it according to its plain letter and spirit, not only by taxing costs, but by imposing such other terms as would carry out the purpose for which the statute was passed. For instance, suppose the opposite party has a deed to prove by witnesses living at a distance; and he makes known the fact to the court. The court says to the party applying, of course, you may amend—that is your right, but you must,

in order to do so, admit the execution of this deed. I have the right, under the law, to fix the price which you are to pay, for the exercise of your privilege, provided in doing so, I do not make it so onerous as to amount to a denial of the just enjoyment of your privilege. How admirably the proceedings would work out. How much delay and expense would be saved! And we should hear no more complaints against the carelessness in pleading which the act encourages. I repeat, the fault is not in the law. It is just and good, but in the courts and in counsel, in not claiming a *quid pro quo* for the benefits and indulgence which it confers on the pleader.

2. The second error complained of is, that Belisle was permitted to testify, that the captain of the boat handed to him a bill of lading. It seems that this evidence was introduced without objection at the time; and hence this ground of complaint is abandoned on the argument.

3 & 4. We think the court erred in ruling out the testimony of William H. Harper. It went to establish the custom on the river, which the defendants seek to set up in this case; and under which they claim exemption from losses by fire.

5. We see no error in the fifth assignment upon the charge of the court. The court having stated the rule correctly, that to make a usage good it must be established, known, certain, uniform, reasonable, and not contrary to law—stated that, if the evidence showed, and we think it did, that the steam-boats on the Chattahoochee river, sometimes gave bills of lading for cotton, containing an exemption from loss by fire, and at other times gave bills of lading containing no such exemption, that then the custom was not established for want of uniformity.

Now, we do not hold that a few departures from the usage, especially if they were the result of peculiar circumstances, would be fatal to the existence of the custom. But the testimony will be found to make a stronger case,

we think, than this. It is for the jury, however, to apply the rule to the evidence and regulate their finding accordingly.

6. The doctrine just laid down is applicable to the steam-boat Franklin. If the proof be as contended for by the counsel for the plaintiffs in error, that two departures from the established usage of that boat only are shown; and these two even were fraudulently procured, the attention of the court should have been called to the actual facts of the case, and a special charge requested in reference to the proof.

7. And hence, we think there is no error in the seventh assignment. It requires more than a mere majority of cases to establish a usage. We repeat, there must be uniformity or at least approximation to it.

8. Was this charge right, that if, from the evidence, the jury believed that the steam-boat Franklin, received the cotton as common carriers, under a contract by which the owners were exempted from loss by fire; and if the cotton was not delivered but burnt on the boat, still the plaintiffs were entitled to recover, unless there was on the part of the defendants, no negligence or want of due care; and that the *onus* of proof, of this ~~fact~~ was on the defendants.

As to the correctness of the first part of this charge, there is no controversy. It is conceded on all hands, that notwithstanding the exception in the bill of lading as to loss by fire, still, if the cotton was burnt, either from the wilfulness or negligence of the carrier, that the defendants are liable. But the debatable point is, does the burden of proof, as to the circumstances under which the cotton was burnt, devolve upon the plaintiffs or defendants? We have bestowed much thought on this question, and examined the authorities to the extent of our opportunity, having held up this case for several weeks since it was argued.

In *Clark et al. vs. Barnell et al.* (12 How. U. S. Rep. 273,) it was held that the burden is upon the plaintiffs to establish the negligence; and that the affirmative lies upon him, when the defendant has brought himself within the exemption contained in the bill of lading.

I would remark that the point under consideration was not very prominent either in the discussion or the decision of the case in which it is enumerated. In a note to *Chitty on contracts*, (top page 212,) the rule is thus stated: "By proving the delivery of the thing to him, the burden of accounting for it is thrown upon the carrier; and he must either show the safe delivery of the goods or prove that loss occurred by one of the excepted clauses, (citing 3 Munf. Rep. 239; Peck 270; 7 Yerg. 340; 2 Bailey, S. C. 177-421; 4 Strobardt 168-180.) "If the carrier" continues the note, "prove that the injury or loss was occasioned, by what is termed the act of God, *prima facie*, he discharges himself; and the onus of proving that the alleged cause would not have produced the loss or injury without his negligence or defective means is thrown upon the plaintiff, (4 Burney 127; 2 Watts 114; 8 Watts 479; 1 Connecticut 487; 3 Mass. 481; 5th Edition of Smith's Leading Cases, 318.)"

In *Swindler against Hilliard & Brooks*, (2 Richardson's Reports, 296,) this point was most thoroughly and ably argued, both upon principle and upon authority, by Messrs. Hunt, Bailey, Petigrue, Memminger, and others, the leaders of the South Carolina bar; and the court held, and we think perhaps properly, 1st, that common carriers cannot exempt themselves from liability for losses arising from negligence; and, 2dly, that where there is a special acceptance, the onus of showing, not only that the cause of the loss, was within the terms of the exception, but also that there was no negligence, lies on the carrier. It is impossible to read the arguments of counsel for the

plaintiffs in that case, and the opinion of the court, and resist the conclusion at which they arriv .

What shipper, when he demands his cotton at the place of delivery, is satisfied to be told that it was burnt? He wants to know *how* it was burnt; and the carrier is bound to give the explanation, for he and his servants alone can do it. He is only excused if the fire was unavoidable, and he should prove that it was so. It is, I repeat, in his power to show the facts, and it should, for that reason, be made his duty to do so. Shippers are obliged to trust to carriers. In the servants and employees of the carrier, the shipper will always find reluctant witnesses. Why force the owner of produce to make them his witness and thus endorse their credibility? In Tennessee the employees and servants of railroads are not allowed to be witnesses in behalf of their employers. Why compel plaintiffs to make them their witnesses and bind them by the truth of their testimony? The more negligent they have been in the discharge of their duty, the more difficult it will be to extort the truth from them. Could they be expected to swear that the cargo was burnt by their negligence? To place the *onus* upon the plaintiff would be to deny him all redress.

I admit the general rule, that he who alleges must prove. But it is equally well established, that the burden of proof should be upon him who best knows what the facts are. If it be said that the agents and servants may be resorted to by the shipper, as well as the carrier, we have only to repeat, that their wishes, feelings and interest are all on the side of their employers. Let the carrier then prove the loss and the manner of the loss. Policy, as well as the safety of all concerned, demands the establishment of such a rule.

9. If the evidence established the existence of the custom set up in this case, then the law presumes that Mrs. Boykin and her agent, Col. Harper, knew it; and she

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will be bound by it. She will be bound if knowledge of the usage is brought home to her, whether her agent knew it or not. But the converse of this, we apprehend, is not true. If the testimony fails to establish such usage, Mrs. Boykin, the principal, will not be bound by the private or individual knowledge of Col. Harper, her agent. In delegating authority to him, to ship her cotton, she is presumed to act under the general law regulating such contracts, or the usage on the Chattahoochee river, provided such usage be proven.

10. The first part of this request is law, and should have been given, in charge to the jury, accompanied by certain explanations; namely—that the jury were to look at the paper itself, and then to all the other circumstances applicable to this point, and determine accordingly as to the intention of the parties respecting the receipt.

Judgment reversed.

WALKER vs. GRIGGS.

If a part of a letter is admissible as evidence, another part needed to explain that part is also admissible.

Assumpsit, in Webster Superior Court. Tried before Judge KIDDOO, at March Term, 1859.

Plaintiff in error, as executor of Joel Walker, deceased, brought suit against James Griggs, as security, on the following promissory note, viz :

“By 25th December next, we, or either of us, promise to pay Joel Walker, or bearer, twenty-six hundred and fifty-three 50–100 dollars, with interest from date; but if

the principal is punctually paid, the interest to be remitted. 23d Dec., 1840."

(Signed)

J. A. MERRIWETHER,
JAS. GRIGGS, security.

The declaration contained a count on a new promise in writing made within six years before the commencement of the action.

The defendant pleaded payment and the statute of limitations.

Upon the trial, plaintiff offered and read in evidence the note above set out, upon which were endorsed credits as follows: "Received \$135 00, May, 1845;" "received \$98 00, 23d July, 1845;" "received \$138 55, 12th February, 1849;" "received \$750 00, 28th May, 1851;" all of which were in the handwriting of J. A. Merriwether, the principal in said note. Also, the following: "Received of J. Adams, administrator of J. A. Merriwether, deceased, the sum of \$1454 77, in full of the amount decreed to be paid to this note by said administrator, and in full of the estate of said intestate in the hands of said administrator; said decree rendered at April term, 1856, of Putnam Superior Court. October 1st, 1856." "(Signed) John H. Walker, Executor," and which credit was proven to be in the handwriting of J. Adams, the administrator of J. A. Merriwether, deceased.

Plaintiff then offered in evidence two letters, in support of the new promise, relied on to take the case out of the operation of the statute of limitations—viz, a letter from defendant to J. Adams, as follows:

PRESTON, 10th February, 1856.

Dear Sir: I have just received yours of the 6th. I regretted very much my not seeing Mr. Walker in Macon; he had just left. I wrote to him from there to be certain to meet me in Eatonton, at March Court; that I was very anxious to see him and try to make some arrangements with him in the notes of Judge Merriwether without suit.

I believe I can give him satisfaction without suing; for I am truly tired of paying cost and being sued. I would rather greatly settle the matter without further expense. The money raised from the notes on Wesley that is in your hands will all be paid to John H. Walker's claims, but I have promised Wesley that the last note shall go to the payment of the fi. fa. that is open against him, which I believe to be just. I, perhaps, will bring some money with me when I come to Putnam; if so, it will be paid on the Merriwether note. I will pay as fast as I can, without suit, you may rely on it. Don't put me to cost, if you can avoid it it. Write to Walker and try to have the receipt for Carswell & Floyd's note credited on the Branham & King fi. fa.; thus there will be the more money to spare for the Merriwether notes. Please ascertain what is due on that fi. fa. against I come up. Mr. Davis has Mr. Walker's receipt for the note. Do what you can for me, and it will be highly appreciated by a friend. Let me hear from you.

(Signed) JAS. GRIGGS.

J. ADAMS, Esq.

Counsel for defendant objected to the second sentence of this letter going as evidence to the jury, on the ground that it was a recital of what was contained in another letter, and that that letter should be produced or its non-production accounted for. The sentence objected to is as follows: "I wrote to him from there to be certain to meet me in Eatonton, at March Court; that I was very anxious to see him and try to make some arrangements with him in the notes of Judge Merriwether without suit." The court sustained the objection, and ruled out that part of the letter, and plaintiff excepted.

Plaintiff's counsel then offered in evidence the following letter from J. Adams to defendant, and to which the

foregoing, it was alleged, was a reply, produced by defendant under a notice, viz :

EATONTON, GA., 7th February, 1857.

JAMES GRIGGS, Esq.,

Dear Sir : Mr. John H. Walker not having come here as I expected, I have not seen him in reference to the note you left with me on Mr. Wesley Griggs to sell to Walker. I received your message through Mr. John H. Gatewood to sell the note to any one else and not to wait for Walker. I saw Mr. Cullen Reid; he may take it at ten per cent. off, if he can raise the money. Promised to see me again about it. If he will take it at that rate, it will be about the best I can do for you in reference to paying the notes Mr. Walker holds on the late Judge Merriwether and you as his security. I thought it best to write to you about the same before they are put in suit. The decree passed at the last September Court, directing what amount was to be paid by me, as administrator of Judge Merriwether, on said claims in full of all the estate of Judge Merriwether, in my hands; the balance falls on you. The papers will have to be sued, if a definite arrangement is not shortly made to prevent it. I will write to Mr. Walker to-day. How would it suit you to pay the note on Mr. Wesley Griggs on these notes and give your note for the balance, and also get him to indulge you on the *fi. fa.*? Or, if Walker is willing, (and I think he ought to be,) give your note for the unpaid balance on these notes on which you are security for Judge M., and give you further indulgence. As it is, I feel bound to write to Walker about the notes, and see what direction he will give in the business. If you and he had met here you might have made some arrangement about these papers; but he not coming, and you leaving before the business was adjusted, leaves me only where Walker put me when he desired the notes to be sued for the unpaid balance. Be pleased to answer this on receipt of it, that

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I may know, or otherwise, unless Walker gives a different direction, the papers will have to be put in suit. I hope it will meet Walker's views to give you further indulgence; but that is between you and him. He wanted the papers sued to March Court next for the unpaid balance, and hence I write in order to know what shall be done.

Respectfully, J. ADAMS.

Plaintiff then proved that defendant, in answer to the notice served upon him to produce a letter from J. Adams, received by him, and dated 6th Feb'y, 1856, stated that he never received such a letter, and that he never received but one letter from him on the subject of the notes upon which he was security for Judge Merriwether. Plaintiffs also introduced in evidence an exemplification of the record of a case in equity, from Putnam Superior Court, from which it appeared that, in 1854, a bill was filed to marshal the assets of the estate of Judge Merriwether, then deceased, and amongst the creditors made parties to said cause was the defendant, and that a copy of the note sued on, with all the credits thereon up to that date, was attached to or filed with said bill. Plaintiff closed.

Defendant offered in evidence a note with the credits thereon, as follows:

"By the 25th December next, we, or either of us, promise to pay Joel Walker, or bearer, five hundred dollars, value received, with interest from date. March 19th, 1851."

(Signed) J. A. MERRIWETHER,
JAS. GRIGGS, security.

Credits endorsed of \$206 52, paid by Adams, administrator of Merriwether, the amount decreed to be paid to this note from the assets of his intestate,—dated October 1st, 1856. Also, the following: "Paid by James Griggs the sum of \$501 14. March 16th, 1857." These credits were in the handwriting of J. Adams, administrator. Defendant also read in evidence from the exemplification introduced by plaintiff, four copy notes, filed with or at-

tached as exhibits, all dated 19th March, 1851, and made by Judge Merriwether, as principal, and one signed by E. Calloway, as security, one by Thomas Clopton, one by S. Black, and one by James Wrigth, jr., as sureties, amounting in the aggregate to \$1100 00, and all payable to Joel Walker, or bearer, on the 25th December next after their date, and closed: counsel went to the jury, and while counsel for defendant was addressing the jury, plaintiff's counsel interrupted him, and read in evidence the Act of the General Assembly, showing that the county of Kinchafoonee was changed to the name of Webster, and the county site, McIntosh, changed to Preston, the 25th February, 1856; the object being to show that Griggs' letter to Adams, dated 10th February, 1856, at Preston, was really written 10th February, 1857.

The court charged the jury, who retired and returned a verdict for defendant; whereupon plaintiff moved for a new trial, upon the following grounds, viz:

First. Because the court erred in ruling out part of the letter written by defendant to Adams, as before stated:

Second. Because the court erred in charging the jury, as requested by defendant's counsel, that if they believed an admission or promise to pay the note sued on had been made under an offer of, or with a view to, a compromise, then the defendant was not bound thereby; the court, however, adding that a letter written by an attorney, informing the maker of a note that he would be sued if it was not paid, and a response offering to pay without suit was not an offer or proposition to compromise.

Third. Because the court erred in charging the jury, as requested by defendant's counsel, "that if they believed the debt sued on had been paid, then they should find for the defendant;" the court, however, adding, "if you can *find any evidence* to satisfy you that it has been paid:—if only one note was referred to and one was paid, then they must be satisfied that it was the note sued on that defend-

ant promised to pay, or his promise was fulfilled, and they should find for defendant.

Fourth. Because the jury found contrary to the charge of the court in this, that the court charged, "that if they believed, from the evidence, that the letter contained an admission, or acknowledgment, or promise to pay the Merriwether notes, it was a promise to pay all the Merriwether notes upon which defendant was security; that the admission, acknowledgment or promise must be clear and unequivocal; but if the particular note was clearly and distinctly referred to, it was sufficient; and if only one note was referred to, and one was paid, then they must be satisfied that it was the note sued on that he promised to pay, or his promise was fulfilled, and they ought to find for the defendant. And if they believed that the letter was written by defendant, in response to the letter of Adams, which was dated 6th February, 1857, then they were authorized to refer to Adams' letter to aid them in ascertaining the meaning of defendant's.

Fifth. Because the verdict was contrary to law.

Sixth. Because the verdict was contrary to the evidence, without evidence, and against the weight of evidence.

The court overruled and refused the motion for a new trial on all the grounds therein taken; whereupon plaintiff excepted, and assigned said refusal as error.

SCARBOROUGH, represented by B. Y. MARTIN, and CLIFFORD ANDERSON, for plaintiff in error.

McCAY & HAWKINS, *contra*.

By the Court.—BENNING, J., delivering the opinion.

Did the court below err in overruling the motion for a new trial? We think so.

We think that the first ground of the motion was a

good ground. The sentence that was excluded from the jury was needed to explain the two sentences next following that sentence. The sentence, therefore, was admissible to explain them, if it was not admissible for any other purpose. Whether it was admissible for the purpose of proving the contents of the letter to which it refers, is a doubtful question. We leave the question undecided; as, by the next trial, plaintiff can have the original letter, or, proof to entitle him to secondary evidence of its contents.

It is true, that there was no evidence to authorize the charge mentioned in the second ground, but, then, the court, in the charge itself, as good as told the jury so. In strictness, however, the charge ought not to have been given.

We rather think the same thing true of the first part of the charge contained in the third ground. The evidence is hardly sufficient to warrant a finding that the note had been paid off.

The latter part of this charge was, we think, authorized by the evidence. It is not certain, from the evidence, (Griggs' letter,) that Griggs' promise related to the note sued on. Light, it is probable, would be thrown on this part of the case, if all of the demands of every kind, held by Walker against Griggs, should be put in evidence.

The other grounds turn on the import and value of the evidence. As a new trial will be granted without them, it is best not to decide them.

New trial granted.

BETHUNE vs. HUGHES, MARSHAL, &c.

A grant to *establish* and *keep up* a market, does not of itself imply the power to exclude all persons from selling elsewhere marketable articles within market hours.

Habeas Corpus, in Muscogee Superior Court. Decision by Judge WORRILL, at May Term, 1859.

This was an application by plaintiff in error, to be discharged from an alleged illegal imprisonment to which he was subjected, under, and by virtue of, a warrant issued by the city council of Columbus, for a violation of one of the market ordinances of said city.

At the hearing before Judge Worrill, in addition to the return of the marshal, it appeared that the following were the market ordinances, for the violation of which, Bethune was fined and arrested, viz :

“That no person shall contract for or vend any articles
“or provisions usually vended in market before the mar-
“ket opens, nor at any place within the limits of this city,
“during market hours, except at the market house. Any
“person violating this provision, either as vendor or sell-
“er, shall pay a fine not exceeding twenty dollars.”

“That nothing, whatever, either meats, fruits, or any
“vegetables, shall be delivered at any place save the
“market house, during market hours, to-wit: till 12
“o'clock M. And the marshal and police be instructed
“to arrest all parties who do it; and that, upon convic-
“tion, such parties shall pay a fine of not less than five
“dollars nor more than ten dollars.”

The following is the section of the act, passed in December, 1858, authorizing the establishment of a market in the city of Columbus :

"Sec. III. *Be it further enacted*, That the mayor and council of the city of Columbus shall have the power to establish and keep up one or more public markets in said city, for the sale of poultry, eggs, butter, milk, fresh meats, and vegetables of any kind, and all other such articles as are usually vended at a city public market; and shall govern the same by such rules and regulations as said mayor and council shall deem necessary and proper; and may prescribe and enforce fines and penalties for a violation of market laws and regulations: *Provided, however*, That said mayor and council may grant private licenses for the sale of marketable articles, or any of them, at a place or places in said city, other than the public market, upon such terms, regulations and control as the said mayor and council may adopt."

After argument, Judge Worrill refused to discharge petitioner, who, thereupon, excepted, and assigns error.

JAMES N. BETHUNE, in *propria persona*, and B. Y. MARTIN, for plaintiff in error.

JOHN PEABODY, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

The only question which we propose to consider and decide is: did the mayor and council of the city of Columbus have the power to pass an ordinance making it penal, to sell such articles as are usually vended at a public city market, at any other place (within certain hours) than at the market?

By the 3rd section of the act of 1858, it is declared that "the mayor and council of the city of Columbus shall have the power to establish and keep up one or more public markets in said city for the sale of poultry, eggs, butter, milk, fresh meats and vegetables of any kind; and all other such articles as are usually vended at the

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“city public market, and shall govern the same as such mayor and council shall deem necessary and proper; and may prescribe and enforce fines and penalties for a violation of market laws and regulations: *Provided, however,* That said mayor and council may grant private licenses for the sale of marketable articles, or any of them, at a place or places in said city, other than the public market upon such terms, regulations and control as the said mayor and council may adopt.”—(Pamphlet Acts of 1858, page 128.)

It will be seen that the act contains only a broad grant “to *establish and keep up* a market” or markets at one or more public places in the city. It confers no power to prohibit the sale of marketable articles elsewhere than at the market place.

Now it is laid down expressly in Grant on Corporations (top page 185, marginal 176,) and in *Mayor of Macclesfield vs. Chapman*, (12 M. & W., 18,) that the grant of a market does not of itself imply the power to exclude all persons from selling elsewhere marketable articles within market hours. And we find no power contravening this. Mr. Grant adds, that “it may be taken for law that the King himself could not, at the present day, convey the right to enforce so great a restriction upon trade.”—(*ibid.*) Perhaps Parliament, in its omnipotence, might. Whether our Republican Legislature has this power, it is unnecessary to decide. It is enough to know that they have not undertaken to exercise it in the present case.

And they will hesitate long before they will knowingly compel decent poor women and boys to attend at the market place, to mingle with the rabble that often assemble there in order to sell a few pounds of butter, or a few vegetables—before they will coerce poor men who bring in poultry and eggs on their load of wood to wait for hours before they can return to their labors, remaining around the market exposed to the weather; or, indeed, before

they will restrict any person, in this land of liberty, from selling his cotton, corn, wheat, beef, pork, chickens, or anything else, when he pleases, where he pleases, and to whomsoever he pleases.

After the judgment of the court was pronounced in this case, my attention was called to the *proviso* in the statute, authorizing the mayor and council to grant private licenses for the sale of marketable articles *at places* in said city other than the public market. It was supposed that the power was deducible by necessary implication from those words. This clause did not escape observation. It does not, it will be presumed, authorize a license to sell *generally* over the city, but at a particular place or places, other than at the market house; and, therefore, does not, by implication, authorize a *general prohibition*, such as that contained in the ordinance. A power like that under consideration, should not depend upon doubtful implication. One which it is exceedingly questionable whether the Legislature itself can exercise or delegate to others.

Again, it is insisted, that as the power is given not only to *establish* but to *keep up* a market; and as this cannot be done but by prohibiting sales elsewhere, the power to do this is necessarily included in the grant, as indispensable to its exercise. Even this result would not justify the assumption of power not delegated. The most that could be said would be that the grant would prove unavailable. But it is not true in point of fact. And here lies the fundamental error of this whole doctrine. A market may be established in such a way as to induce most persons who vend articles to go there for that purpose. It possesses inherent advantages over other places. Property sold in market is attended with certain incidents which do not attach to private sales. Besides, stalls and other conveniences might be furnished without expense to the producer. Even bounties and premiums may be awarded,

so as to encourage both the quantity and good quality of the articles vended at the market. Individuals are compelled to hold out inducements to secure trade; why should not communities be required to do the same. Private persons coax trade to their doors; whereas municipal corporations force it to their market places by penal enactments, levying a tax at the same time upon the producer, to supply their treasury with revenue. Let the burden fall, where it ought to fall, upon the consumer. In short, let any thing and every thing be done, rather than restrict commerce, rather than force and imprison trades-people, to coerce them to submit to all kinds of discomfort and inconvenience, not to say loss, to gratify the selfishness, or avarice, or convenience of a favored few; to be taxed to support the pomp and parade of a few municipal lords.

The best feeling formerly subsisted in our country towns between the consumer and producer; they were mutually respectful and friendly; the country people frequently contracting with the citizen consumer for weekly or even winter or summer, or yearly supplies of certain edibles. Weights and measures were satisfactory, and prices remunerating. The wives, daughters and boys of the small farmer were treated with the civility due to their sex and condition. But how changed under these anti-free-trade regulations. No wonder that irritation has taken the place of good feeling!

A convention of the people, called by the people, I would most respectfully suggest, is imperiously needed to impose additional restraints upon the powers of the Legislature, now more unlimited, in the opinion of some of our ablest jurists, than those of the British Parliament. Our honest, simple-hearted, ancestors supposed that when they had guaranteed trial by jury, freedom of the press and of religious worship, no more was needed. Our State Constitution contains fewer safe-guards, perhaps, than any

other in the Union. The new States are far ahead of this, and most of the old States, in this respect. But times have changed. And well as our system has worked in days past, a Bill of Rights is *demande*d. The great fundamental principles of human rights should be put beyond the reach and control even of constitutional change by the Legislature. Let the sovereign people convene, and say to the law-making power: thus far shalt thou go and no further.

Excessive legislation—the vice of all free governments—is, perhaps, the fault of the State. Through haste, inadvertence, and other causes, case legislation and class legislation is to be found frequently upon our statute book. Something should be done to arrest this evil. The dearest rights of the people are jeopardized.

A peaceable citizen, who discharges punctually all his public duties, and respects scrupulously the rights of others, should be left free and untrammelled as the air he breathes, in the pursuit of his business and happiness. Fetters are equally galling, whether imposed by one man or by a community; and I am not ashamed to confess that the best sympathies of my heart are, and always will be, interested for one who is, or may be, incarcerated, because, in the proud consciousness of a freeman, he claims the right to offer for sale, at any hour of the day, on the highway, or in the streets, as interest or inclination may prompt him, any commodity he may possess, the traffic in which is not forbidden by the laws of the land.

Judgment reversed.

BLUE, ADM'S, ET AL., vs. SHEPPARD, ET AL.

Security upon a *ne exeat* bond, when sued thereon, cannot object to the sufficiency of the affidavit upon which the bill was sanctioned.

Debt on *ne exeat* bond, in Schley Superior Court. Decision by Judge WORRILL, at April Term, 1859.

This was an action of debt brought by Simeon Blue, administrator of Margaret Dowd, deceased, and others, against Samuel Sheppard, and Jeremiah Wyche, and Mary J. Tomlin, on a *ne exeat* bond, executed by Sheppard, as principal, and Wyche and Tomlin, as sureties.

The facts of this case are, that Blue and others, heirs-at-law of Benton W. Dowd, deceased, filed their bill against Samuel Sheppard, administrator of said Dowd, for an account and settlement of the estate of said intestate. Pending this bill, complainants filed a supplemental bill, alleging that Sheppard was about to remove, with all his property, beyond the limits of the State, and praying for a writ of *ne exeat*, to retain defendant, under a sufficient penalty, from going or removing beyond the jurisdiction of the court. This bill was sanctioned, and a writ of *ne exeat* issued, by virtue of which defendant was arrested, and entered into bond, with Jeremiah Wyche and Mary J. Tomlin sureties, in the penalty of six thousand dollars, conditioned that if Sheppard should well and truly satisfy and pay the eventual condemnation in said equity case, then said bond to be void, otherwise, to remain in full force. The equity cause proceeded, and complainants had a verdict for six hundred and eighteen dollars against Sheppard, upon which judgment was entered, and execution issued, and the sheriff returned "no property to be found upon which to levy this *fi. fa.*;" whereupon,

plaintiffs instituted this suit upon said *ne exeat* bond. At the trial, plaintiffs offered and read the bond in evidence. They then tendered in evidence the records of the equity cause, containing the original bill, supplemental bill, writ of *ne exeat*, verdict, judgment, &c. Defendants' counsel objected to their introduction as evidence, on the ground that the affidavit to the supplemental bill praying for the *ne exeat* was not sufficient in law to authorize the granting and issuing of said writ. The court sustained the objection and excluded the evidence, and plaintiffs having no further testimony, the court, upon motion of defendants' counsel, ordered a non-suit. To which rulings and decision, counsel for plaintiffs excepted, and assign the same as error.

BLANDFORD & CRAWFORD, and E. W. MILLER, and STUBBS & HILL, for plaintiffs in error.

ELAM & OLIVER, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

It is true this court has held that in cases of *ne exeat* the affidavit should be positive as to the intention or threats of the debtor to go beyond the jurisdiction of the court. The facts stated in the supplemental bill are charged as coming within the knowledge of the complainant, and we are not prepared to hold that the verification made under these circumstances is not sufficient.

But concede that the affidavit taken in connection with the allegations in the bill, is not sufficient: does not the objection come too late? The bill was demurred to on the ground that it did not aver that the securities, upon the administration bond, were insolvent; and upon no other ground. Is it allowable to cut up a case in this way? and at this distant day to object to the sufficiency of the affidavit—an objection which, if good at all, might

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have been taken advantage of by the demurrer? We think not. Had the objection been made at the proper time, and sustained, the proceeding could have been amended while Sheppard was in the State. It comes too late.

It is said that this is the first time the securities to the *ne exeat* bond could be heard. Not so. They act in privity with their principal, and must abide by the consequences. Securities on the appeal might just as well claim the right to contest a judgment rendered against their principal when they are sought to be made chargeable with the recovery. They undertake for their principal in view of such liability; and they must abide the consequences whether they result from the neglect or misconduct of their principal. They are entitled at every stage of the proceeding by which they may be ultimately bound to be heard through their principal. It is their folly if they fail to avail themselves of this privilege.

Judgment reversed.

WILKERSON vs. WOOTTEN.

Co-executors have all, a joint and entire authority, over the assets, and the acts of any one of them are deemed the acts of all.

Complaint, in Lee Superior Court, and Nonsuit, by Judge ALLEN, March Term, 1859.

This was an action on the following contract brought against Wootten, administrator *de bonis non*, with the will annexed, of Enoch Johns, deceased. To-wit:

"I agree and hereby contract to employ James W.

Wilkerson to oversee on the plantation of Enoch Johns, deceased, for the year 1857, and in consideration of his services as such, I promise to pay said Wilkerson, at the expiration of the year, two hundred and fifty dollars in money, and the amount of cotton that ten acres of good land will bring.

(Signed)

ELIZABETH D. JOHNS,
as Ex. of Enoch Johns, deceased.

Witness: John Spence, John F. Cook.

Nov. 10, 1856.

It appeared that Thos. H. Moody and David J. Johns were also acting and qualified executors of testator when said contract was made by Mrs. Johns, their co-executrix. That the will of Enoch Johns directed and required the executors to keep his estate together, and work the plantation for the benefit of the legatees. That Mrs. Johns resided on the plantation. That about the 1st February, 1857, under a bill filed, a receiver was appointed, who took charge of the estate, including the plantation, and discharged Wilkerson and employed another person to oversee. Plaintiff insisted, at the time, upon his right under the contract, to remain, but the receiver would not permit him to do so. Plaintiff proved what was the value of the cotton that ten acres of good land would yield, and closed.

Defendant moved for a nonsuit on the ground that one executor, where there are several acting and qualified, cannot make a contract to bind the estate. The Court sustained the motion, and ordered a nonsuit, and plaintiff excepted.

FRED. H. WEST, for plaintiff in error.

WARREN & FLOYD, and VASON, contra.

By the Court.—BENNING, J., delivering the opinion.

Was the Court right in granting the nonsuit?

The ground on which the Court went, was, that "one executor, where there are several, cannot make a contract binding upon testator's estate." Is this ground true in law. We think not. It is laid down by Williams, in his treatise on executors, that co-executors "have all a joint and entire authority over the whole property;" and that "the acts of any one of them are deemed to be the acts of all." (2 Williams' Ex'rs, 688.) In these propositions he is well supported by authority; and we think that the propositions taken generally are true. 8 Ga. 388.

We see nothing special in this case to make the case an exception to the law expressed in the propositions. The executors had the power to employ an overseer, Mrs. Johns was one of them; she therefore, had, by herself, that power.

We think, then, that the ground on which the nonsuit was put was not a sound one.

It was scarcely insisted that it was; but it was insisted that there was another ground on which the nonsuit might be supported; and that was that the overseer had been discharged by the person who had been appointed "receiver" of the estate, and who has, as receiver, taken charge of the estate; the argument being, that the appointment of the receiver deprived the executors of the power of fulfilling their contract, and the appointment being lawful and binding on them, they ought to be held excused for not fulfilling the contract. This raises a very important question, and one which was not made in the Court below, or much discussed in this Court. We, therefore, prefer not to decide it, if we can avoid doing so, and we can avoid doing so, for even if we grant the position to be true, yet it was not sufficient to authorize a nonsuit, as the overseer had performed some service

under the contract, and therefore, was entitled to recover at least as much as that was worth. The executors do not plead a want of assets.

Judgment reversed.

MEREDITH AND WIFE vs. HUGHES.

A husband is called upon to testify on an issue of *devisavit vel non*, where his wife takes an interest under the will if established by law, upon which his marital rights would attach; he by deed conveys the whole interest in trust for the sole and separate use of his wife and children; subsequently the wife relinquishes to her children. *Held*, That the wife had the right to execute the conveyance, and that the husband was thereby qualified to swear as a witness in the case. And further, that the wife being no party to the case, and her interest being determined, it did not violate the rule which forbids husbands and wives from testifying for or against each other.

Caveat to will, in Twiggs Superior Court. Tried before Judge LAMAR, March Term, 1859.

This was an appeal from the Ordinary, in the matter of propounding for probate the last will and testament of John W. Allen, deceased, late of the county of Twiggs. Wyatt Meredith and wife, who was the sister of decedent, filed their caveat to the probate of said will.

Upon the trial, propounder Daniel G. Hughes proved the due execution of the will by the subscribing witnesses, and read in evidence the same. He then offered and read in evidence the renunciation of James R. Combs, as one of the executors of said will; also his relinquishment of

his trusteeship in and under said will, for the children of Theophilus B. Booth, and the order of the Judge appointing Frank Scarborough trustee in his place, and Scarborough's acceptance of the trust ; and also the relinquishment of Combs to his wife and children of all right, title and interest in and under said will.

Propounder then offered Combs as a witness. Caveators objected on the ground that he was incompetent, being called to support a will under which his wife took a legacy. After argument, but before the decision of the Court was pronounced on the objection, the witness was withdrawn.

Propounder then offered in evidence a release from Combs to his wife and children, and at the same time, a relinquishment under seal, from Mrs. Combs to her children, all of whom were minors, of all her interest in and under the will.

To the introduction of which, caveators objected.

1. Because said relinquishment was without consideration, and therefore void.

2. Because being under coverture, Mrs. Combs could not make a valid relinquishment to her children.

3. Because by the paper, propounded as the will of John W. Allen, an estate is left to Miss Mary Booth for life, and at her death, without children, to her brothers and sisters, of whom Mrs. Combs is one ; that said Mary Booth has died, and Mrs. Combs' share or interest in remainder has vested in her husband, subject to her equity, and that she cannot convey, assign or relinquish that equity.

4. Because if Mrs. Combs can release or assign her interest, such release or assignment would not render her husband a competent witness, such release passing no right or interest to her children until the will is established, and the rule of law excluding the husband, still existing in all its force.

The Court overruled the objection, and the releases and assignments were admitted and read to the jury, and counsel for caveators excepted. Caveators also excepted to the reading of said releases to the jury, on the ground that they were matters only for the consideration and decision of the Court upon the question of the competency of Combs as a witness upon the issue of *devisavit vel non*.

Propounders then withdrew the record, before offered and received in evidence, appointing Frank Scarborough trustee, and Combs' release to Scarborough, and again tendered Combs as a witness. Caveators again objected on the grounds before taken and stated.

The Court overruled the objection, and caveators excepted. Combs was then sworn and examined on the part of propounder, after which, and after reading the depositions of several other witnesses, propounder closed.

Caveators introduced no evidence, but requested the Court to charge the jury, "that where the disposition of his property by the testator is not consonant to his natural affections for his relations, and where it is obtained by parties materially interested and under circumstances which placed decedent under the power, control and influence of such parties, the absence of his near relations at the time the will was executed, there being no apparent necessity for haste, and their presence being of easy procurement, the will being written by a party taking a very large benefit under it, and in the presence only of the testator and another party taking the next greatest interest under it, are circumstances which the jury may consider, in connection with the neglect of the claims of relations, and an unaccountable benefaction in favor of mere strangers, as affording a presumption of fraud or circumvention in the procurement of the will, which is to be rebutted only by clear and direct proof of circumstances affording a contrary presumption:"

Which charge the Court gave as requested.

The jury found for the will, except the 10th and 11th clauses thereof, which they found to be void under the Acts of the General Assembly prohibiting the manumission of slaves.

Whereupon counsel for caveators tendered their bill of exceptions, assigning as error the rulings and decisions before stated and excepted to.

C. B. COLE, E. A. & J. A. NISBET, and ROCKWELL, KENNAN & CALDWELL, for plaintiffs in error.

J. L. HARRIS, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

If J. R. Combs was a competent witness in this case, it is conceded that the will of John W. Allen, deceased, is sufficiently proven. Was his testimony admissible? The answer to this question depends upon the sufficiency of the releases executed by Combs' wife, in order to qualify him to testify.

The points ingeniously made and ably discussed by counsel, upon this branch of the case, are delicate and somewhat perplexed. Still after a full and somewhat careful examination of all the authorities cited, and others at our command, we feel constrained to let in the testimony of this witness.

It is not disputed but that Combs had the right to relinquish his interest under the will to his wife and children, but the power of Mrs. Combs to convey to her children all of her interest under the will of the testator, and under the release executed by her husband, so as to qualify him to testify in the case, is strenuously combatted. Without examining separately the four objections made and argued against the right of the wife to make the relinquishment which she did, we would state, as the judg-

ment of the Court, that she had the right to release to her children all the interest which she acquired, whether *vested* or *reversionary*. And in support of this opinion, we refer to Clancey on Husband and wife, 2d American from the last London edition, from page 812 to the end of the chapter, where this whole doctrine and the cases upon which it is founded, are fully considered.

It will be found that it is only when dealing with her *husband* that a court of equity will see to it, by examination or otherwise, that the wife acts as a free agent. There is and can be no such necessity for interfering, when executing a conveyance to her children.

As to the impolicy of allowing husband and wife to testify for or against each other, while we fully recognize the rule, although it be "a creature of judicial parentage" and not of "positive law," still we cannot see its applicability in the present case. The wife's interest, whether under the will of John W. Allen, as a child of Booth, or as heir or distributee of her deceased sister, Mary Booth, had ceased before her husband was called upon to testify. Nor does his testimony relate back to any past act or declaration of hers. The issue is *devisavit vel non* as to John W. Allen's will, and we must think the principle invoked is wholly foreign to the question to be tried; and to which the husband was called as a witness. The wife's interest was but prospective at best; and she had ceased to be a party even in interest, as to that.

What conjugal confidence would be violated, what matrimonial endearments impaired by the allowance of the proofs? We again confess our inability to appreciate the force of the reasoning upon which this exception is founded.

Judgment affirmed.

SARAH (A SLAVE) vs. THE STATE.

1. It is not error in the Court to allow a prisoner in a capital case, to be tried by a jury taken from the grand jury list, by the consent of both counsel for the State and the accused.
2. As the prisoner may waive even a trial itself, and be capitally punished upon his own confession of guilt, he may waive every minor right or privilege. The greater includes the less, or the whole the parts.
3. The confession of a slave freely and voluntarily made at the time is not rendered objectionable because punishment had been inflicted at some previous period, to compel her to confess.
4. On a motion for a new trial on the ground of newly discovered testimony, the fact expected to be proved, should, if possible, be verified, and it is necessary for the defendant to swear that the evidence was unknown at the time of trial.
5. Notwithstanding the presiding Judge may betray some emotion on the trial of a criminal cause, still if no rule of law is violated, a new trial will not on that account be granted.
6. Where a slight mistake occurs in taking down the testimony which is read to the jury, a new trial will not be granted if the evidence, was full and complete otherwise, as to the guilt of the accused.
7. The Court itself may take down the testimony in a criminal case instead of having it done by an amanuensis.
8. The omission of the Court to ask the prisoner if he have anything to say why sentence should not be pronounced, is not such an irregularity as will entitle the accused to a new trial.
9. Where the law confides to the Court the discretion to inflict the death penalty or some milder punishment, it must be an extreme case to induce or even warrant this Court in interfering with the sentence.

Indictment for an attempt to poison, in Harris Superior Court. Tried before Judge WORRILL, at April Term, 1859.

Sarah, a negro woman slave, the property of Benjamin Williams, was indicted for feloniously, unlawfully and

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maliciously furnishing, giving and administering "a certain poison, to-wit, three grains of strychnine and arsenic, knowing them to be deadly poison, to one John Williams, with intent then and there, him the said John Williams wilfully, unlawfully, feloniously and of malice aforethought, then and there to poison, kill and murder."

The defendant pleaded not guilty, and the following is a brief of the evidence:

Evidence for the State.

John Williams testified, that on the 6th October, 1858, he ate breakfast at the house of Benjamin Williams, his father, with the family, took a piece of meat, fried ham, on his plate and ate it, it tasted very bitter, his father also took a mouthful and said it was poisoned; rose from the table and told all to eat no more of it; witness did not suppose it was so; by this time had taken a cup of coffee, which he found more bitter than the meat; witness rose from the table and left; also took a mouthful of bread, which was also bitter; the other members of the family complained that the victuals had a bitter taste, two were made sick; then a piece of bread, the same witness ate of, was given to a dog, piece as large as his fist, and before the dog finished eating half of it he died, dropped dead in his tracks; immediately after eating, witness became sick at the stomach, not much so; there was a burning sensation, felt weakened and relaxed in his limbs, so much so that he could not stand up, and had no use of himself. Sarah, the prisoner, was the cook, cooked the breakfast that morning, she did not eat anything; his father asked her if she drew water that morning, she replied she did not, for she did not have time to do it; does not know where she got the water, heard her say she got the water, out of the well bucket, she cooked breakfast with, but did not draw it.

William Nelson testified that he being informed that

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Mr. Williams' family was poisoned, went over and found Doctor Fonville there, who had given them medicine, all seemed to be quite sick; saw the dog at the kitchen door, dead; the doctor, after giving the medicine, went to where Sarah, the prisoner was, and beckoned to witness to come to him; told witness she had confessed that she had white powders, and would go and look for them; went with them to the gin house lot, where prisoner took from under the bottom rail of the fence, a paper with white powder in it. The doctor opened the paper and tasted it, showed it to witness, he has kept it ever since, (produced in court, and swore that it was the same paper of powders that prisoner took from under the fence) recollects that she said it was the remainder of the powders.

Dr. Hatchell testified that he had examined the powders produced by Mr. Nelson in court; heard Williams describe his symptoms, thinks they were produced by strychnine, thinks the powders are strychnine, examined them the day the family were poisoned; strychnine is a deadly poison.

James G. Smith testified that about 7th October last, hearing that Williams' family were poisoned, he went over and found several of the family sick, saw the dead dog; did not hear the prisoner confess that she poisoned the family; when interrogated whether she did the poisoning, she would say that Howell was there the night before. Witness asked her what part of the breakfast was poisoned, she replied the bread, meat, coffee and all were poisoned.

Evidence for the Defence.

William Howell testified that he was at the house of Benjamin Williams the night before his family were poisoned, he drew a bucket of water that night and put strychnine and arsenic in it; no one saw him do it, it was about one or two o'clock at night; did not tell Sarah

he was going to put the poison in the bucket. He had given Sarah poison before to put in the bucket, but she would not do it; did not tell her he was going to put the poison in the bucket.

Upon this testimony and under the charge of the court, the jury found the defendant guilty.

Counsel for prisoner moved the Court for a new trial on the following grounds:

First. Because the Court erred in allowing said slave to be tried by a jury taken from the grand jury list, notwithstanding counsel for prisoner consented thereto.

Second. Because the jury after being out sometime, were, by consent of the Solicitor General and counsel for the prisoner, brought into court, and the court, both counsel consenting, read over the testimony as taken down on the trial.

Third. Because the witness Nelson stated portions of prisoner's confessions after he had stated that he had heard that she had been whipped that morning by her master for the offence, counsel for prisoner remarking at the time that at the proper time he would move to withdraw said testimony from the consideration of the jury, but did not make the motion.

Fourth. Because of newly discovered evidence, which was not known to prisoner's counsel until after the trial.

Fifth. Because when the witness, Nelson, was about to state what Dr. Fonville said when he examined the powders, prisoner's counsel objected. The Solicitor General replied that he went into the trial under the impression that Dr. Fonville was in court, but that he had just been informed that he had gone home, six or eight miles off.

The presiding Judge remarked that he would continue the case if he desired it, when counsel for prisoner consented that the witness might state what Dr. Fonville said, remarking that he would admit the evidence rather than have the case continued. Whereupon the witness

stated that Dr. Fonville tasted the powders and said that it was bitter, and handed them to witness.

Sixth. Because the verdict is against the weight of evidence.

Seventh. Because the sentence pronounced upon the prisoner, by the Court, is more severe than authorized by the evidence.

Eighth. Because after the witness Howell had been examined and confessed that he put the poison in the well bucket, the court suspended the proceedings, and in the presence of the jury, sentenced witness for the crime "of attempting to procure a negro to commit the crime of poisoning." (Howell having been previously convicted, at the same term, of said offence.) The Judge remarking to him that he intended to sentence him to five years imprisonment in the penitentiary, but after his open and bold confession, he would sentence him for seven years, and if he had the authority he would sentence him for fifty years.

The Court when charging the jury, remarked: "Gentlemen, a word in reference to the testimony of the witness, William Howell, introduced in behalf of the defendant; he has confessed his guilt of the most diabolical crime known to the laws of society, it is for you to attach such credit to his evidence as you in your judgment may think it deserves."

After argument, the Court overruled the motion for a new trial, to which decision counsel for the prisoner excepted, and assigns the same as error. The counsel for prisoner filed the following further exceptions to the rulings and decisions of the court:

That the court erred in reading over to the jury the following sentence as part of the testimony of John Williams, to-wit: "Thinks she drew the water that morning," it appearing after the verdict, that the same was no part of the testimony of said witness, and was inserted by

mistake; and in reading to the jury and using the word "remainder" as part of the testimony of William Nelson, when he used no such word, but the word "*balance*."

That the court erred in taking down the testimony itself, and in not appointing some one else to act as clerk.

That the court erred in not calling on the prisoner or her counsel to say what she had to say why the sentence of the law should not be pronounced upon her.

D. P. HILL, for plaintiff in error.

W. D. ELAM, Sol. Gen. pro. tem., *contra*.

Judge STEPHENS absent.

By the Court.—LUMPKIN, J., delivering the opinion.

1. Was it error in the court to allow the prisoner to be tried by a jury taken from the grand jury list, by the consent of both counsel for the State and the prisoner? We think not.

And we lay down the broad proposition that as a prisoner may waive even a trial itself, and be capitally punished upon his own confession of guilt, he may waive any minor right or privilege. The greater including the less. Besides, by the act of 1856, all persons between the ages of twenty-one and sixty are qualified to serve as jurors in criminal cases. There is, therefore, no legal disqualification attached to any of the jurors who tried this case. Perhaps a jury taken from the grand jury list is the best that could be selected to try a slave. A slave has no peers or equals by whom they can be tried. He finds his best security in the grand jury box.

Again; it is only "on request" that the court will supply a full pannel from which a jury in a criminal case is to be selected. Suppose the prisoner even when accused of a capital felony, should consent to be tried by either pannel of the petit jury in attendance on the court, no one

we apprehend, would question the legality of the verdict.

2. Here, again, we have an exception to an act done by the consent of parties. It is binding, and the prisoner must abide by it. As the witnesses had dispersed, there was no irregularity in it anyhow. As the jury were not distinct in their recollection of the proof, it was the proper mode in the absence of the witnesses, of refreshing their memory.

3. We see no objection to the testimony of William Nelson. What if the negro had been whipped by her master the morning before she made the confessions, as proven by the witness, that does not make her voluntary confessions to Nelson subsequently, objectionable. Besides, counsel should have moved to withdraw the testimony if it was illegal, and the excuse he renders for not doing so, is hardly satisfactory.

4. The showing made by Mr. Hill, as to the newly discovered evidence, is not sufficient; the fact is not verified which he expects to establish on another trial. Who was his informant, and where is his affidavit? But more than all, where is the affidavit of the prisoner herself, that she did not know of the facts proposed to be proved at the time of the trial? If they existed, she necessarily knew them, and should have communicated them to her counsel. They related to her condition at the time she made the confessions testified to by Nelson.

5. There is nothing in this objection. The testimony amounted to nothing. But be that as it may, the prisoner's counsel consented to its introduction.

6-7. These two assignments may be disposed of together. The sum and substance of the objection is, that the whole conduct of the Court was calculated to disparage the credit of the witness Howell. It may be that the presiding Judge yielded to the excitement of the moment, elicited by the bare-faced confession of Howell, evidently made to screen his guilty paramour; still he did not vio-

late the statute which forbids the Judge to express or even intimate an opinion as to what has or what has not been proven; or as to the guilt or innocence of the prisoner at the bar. This being so, the Judge must be left to his own sense of propriety as to what is due to himself as well as the prisoner on such occasions.

8. If the mistake in the testimony, as read to the jury, was of a character to make it material to the conviction, we should deem it our duty to grant a new trial, notwithstanding the counsel of the prisoner was present and made no objection as to its accuracy. But it is very slight. The witness Williams says, "he thought the girl *drew* the water that morning." He is not certain. If the poison was deposited in the water, it was worse for her that she did draw it. Howell says he drew it the overnight, and put the poison in it unknown to prisoner. After all, the evidence is so uncertain and immaterial, and the evidence of the defendant's guilty participation in this wanton and diabolical crime so satisfactory, without the proof, that we do not think the case should be sent back, notwithstanding the oversight of the Court and the prisoner's counsel, relative to the matter.

9. It was not error in the court to take down the testimony; and so this court has heretofore decided.

10. The ancient practice was for the court to call on the prisoner, if he or she had anything to say why sentence should not be passed. It originated at a time when prisoners were not allowed the benefit of counsel, and when the court was counsel for the prisoner, so far as to see that he was deprived of no legal right. Besides the benefit of clergy was also allowed; and at this stage it was claimed. This is expressly abolished by our penal code.

Our penal code prescribes with some minuteness the formula to be observed in the trial of criminal cases. No allusion is made to this ancient ceremony. Prisoners represented by counsel, as they now are, lose no right by

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the omission. One of the reasons assigned in the books for the observance of the practice is, that a motion may be made in arrest of judgment. These motions are made daily, and always before the prisoner is called up to be sentenced.

Here a new trial was moved for. In the order of pleading, this follows the motion in arrest of judgment, and, therefore virtually overrules it. All the grounds against the judgment are taken in the motion for a new trial. If she had a pardon, or should even obtain one afterwards, it would be available even under the gallows. Had it been made to appear that the prisoner had lost any right by the failure of the court to observe this ceremony, relief would be extended.

11. We are satisfied beyond a reasonable doubt that the defendant is guilty, and that the verdict is in accordance with the proof; and the court below was right in refusing a new trial.

12. Is the punishment inflicted disproportioned to the offence, inasmuch as no one was killed? The law has left it discretionary with the court to inflict the death penalty or some milder punishment for this offence. It considers the extreme penalty sometimes justifiable. If the defendant be guilty, and the testimony and the verdict establish the fact, can we conceive of a more aggravated case? An attempt is made to cut off by one fell swoop the whole family from among the living. And that too, without the slightest provocation!

When we consider the facility with which this crime may be committed, the temptation to its perpetration, either under the influence of temper and revenge, or urged to it by base men to accomplish their own wicked and corrupt purposes; in a clear case of guilt the stroke should not be averted. It is due to the living that one so depraved should not be spared.

Judgment affirmed.

SMITH & LENNARD vs. LARD, ET. AL.

If there is no equity in the bill, the injunction it prays for ought to be refused.

In Equity, in Randolph Superior Court. Decision by Judge KIDDOO, at Chambers, June, 1859.

This was a bill filed by Smith & Lennard, partners, to enjoin proceedings under an execution, which had been levied on certain property alleged to belong to complainants.

The bill states, that complainants purchased, in October, 1856, from Lodwich E. Lard a lot or parcel of land in the town of Cuthbert, and took his deed of conveyance for the same. That at the time, there was an execution against Lard, in favor of E. H. Marlin, amounting to about fourteen hundred dollars, which execution had been transferred to John M. K. Gunn, who became, and is now the legal owner thereof.

The bill further states that about the 1st October, 1856, said execution was levied upon certain property, as that of defendant Lard, and said levy advertised by the sheriff as "one-third interest of steam mills and fixtures, together with one-third interest of eleven hundred acres of land immediately attached, being the interest formerly owned by Thomas Douglas; one-third of one-half of lot of land, No. 118; one-third interest of lot of land lying east of the mill, and cornering on the Hugh McKinnon lot, number not known; one-third saw timber on lot of land No. 112; one-third saw timber on lot No. 29, all in the 6th district of Randolph county, levied on as the property of L. E. Lard and Martin D. Kendrick, under a *fi. fa.* issued from the Superior Court of Randolph county, in favor of E. H. Marlin, against L. E. Lard and M. D. Kendrick,

makers, and Thomas D. Douglas and William E. Callier, endorsers, and others, in my hands."

That under said levy and advertisement, said property was offered for sale on the first Tuesday in January, 1857, and bought by one John Hendricks, at and for the sum of \$1810, he being at that price the highest bidder, but said purchaser refused to comply with his bid and pay the amount thereof, on the ground that the sale was illegal and void.

The bill further states that the property was re-advertised for sale, and that this advertisement stated that the property had been levied on as the property of Lard, to be sold at the risk of the purchaser; and that in May, 1857, it was again offered for sale by the sheriff, when John M. K. Gunn, the assignee of the *fi. fa.* became the purchaser of the lot, and for the sum of one thousand dollars, he being at that price the highest bidder, and the sheriff executed and delivered to him a deed for the property, and put him into possession of the same.

The bill further states, that under legal proceedings had to enforce the bid made at the first sale by Hendricks, or the difference between that bid and the last sale, it was held and determined by the Supreme Court of the State, that said sale was void. And complainants allege and submit that the first sale being adjudged void, the second sale made in May, thereafter, was also null and void, and that said property still belongs to Lard, and subject to said *fi. fa.* The levy endorsed by the sheriff on the *fi. fa.* designated the property as that of all the defendants in the execution, while the advertisement mentions or describes it as the property of Lard alone, and for which reason, said sale was held and adjudged illegal and void.

The bill further charges, that if the first sale had been legal, the purchaser would have complied with his bid, and thus an amount sufficient to satisfy said execution would have been raised and paid thereon. And that if

the levy and advertisement had corresponded at the last sale, the property would have sold for more than enough to satisfy said *fi. fa.*, and thus the property purchased of Lard by complainants discharged from its lien, whereas there is still due on said *fi. fa.* about \$900, and the same has been levied upon complainant's lot, and advertised to be sold. That Lard is insolvent, and the warranty contained in his deed to complainants, unavailing and worthless.

The prayer of the bill is, that said *fi. fa.* be enjoined, and that the sheriff and Gunn be restrained from proceeding with said levy and sale, &c.

The Judge refused to sanction the bill and to grant an injunction as prayed for, and complainants except, and assign error.

E. H. PLATT and W. C. PERKINS, for plaintiffs in error.

DOUGLASS & DOUGLASS, *contra*.

By the Court.—BENNING, J., delivering the opinion.

Did the court err in refusing to grant the injunction? We think not; we think that there was no equity in the bill.

It may be assumed that there was no equity in the bill; unless it was true, as alleged by the bill, that the sale of the land by the sheriff, to Gunn, was void. If that sale was good, the land ceased to be Lard's, and became Gunn's, and therefore it is not now subject to the *fi. fa.*

Was that sale void? The complainants insist that it was, and the reason they give for so insisting is thus stated by them: "because orators charge that the levy designates said property as that of said defendants, all of them, while the advertisement under which Gunn purchased, describes it as the property of Lard alone."

But first, we do not find that this reason is true, in

point of fact. The bill gives but one levy, and it gives that thus: "your orator further sheweth, that on the first day of October, 1856, Early Varner, as deputy sheriff of said county, levied said *fi. fa.* upon certain property, as that of Lodwick E. Lard, to-wit: one-third interest of steam mill and fixtures," &c., "all in the 6th district of said county, and levied on as the property of defendant," &c., not as the property of defendants. It is not true, in fact, then, that this "levy designates said property as that of said defendants, all of them." This levy designates it as the property of Lard only.

The reason being, in point of fact, not true, there can be no valid conclusion from the reason. Consequently, the conclusion stated in the bill, that the sale to Gunn was void, cannot be a valid one.

But what is the true conclusion from the real facts, the facts as they are stated in the bill? It is the opposite to that drawn in the bill—it is that the sale to Gunn was valid—for the facts as stated by the bill are that the property was levied on as Lard's, was advertised as Lard's, was sold as Lard's, and was bought by Gunn as Lard's. Consequently, it must be true, that the sale to Gunn was valid, if regularity in these respects could make the sale valid.

This would be enough to show that there is no equity in the bill as it stands, but we are by no means prepared to say that the sale was void, even if it were true, that the property was levied on as the property of all the four defendants, and was advertised and sold as the property of only one of them, Lard. The greater includes the less, the levied property, therefore, included the advertised and sold property. If the levy gave the right to sell the whole of what was levied on, why did it not give the right to sell a part? Who would be hurt by a sale of a part? The other part would still remain subject to be sold. Gunn might still sell the interest of the three other

defendants than Lard; and, out of that interest, make the balance of his money. It may be true, that Gunn would not be bound to do this, that he would be at liberty to make that balance out of other property of Lard's, or of Lard's vendees, if subject to his *fi. fa.* to make it, say, out of this property sold by Lard to the complainants; yet if he did so, he would do only what a plaintiff in *fi. fa.* has the legal right to do; he would do only what he might have done at first, for he might at first have instructed the sheriff to levy the money out of Lard exclusively; he would do no lasting harm to Lard, or his vendees, the complainants, for if, in this way, he should make an over proportion of his money, out of Lard's property, or out of that of Lard's vendees, Lard or Lard's vendees would be entitled to contribution from the other three defendants, and thus, in the end, Lard or his vendees would lose nothing.

But, as before said, it is sufficient that it does not appear to be true, that the property was levied on as the property of the "defendants, all four."

Judgment affirmed.

COOK vs. JONES.

When the verdict of the jury is strongly and decidedly against the weight of evidence, not only as to the amount of damages found, but the right of the plaintiff to recover at all, and the Circuit Judge grants a new trial, this court will not interfere.

Case, in Muscogee Superior Court. Tried before Judge WORRILL, at November Term, 1858. Motion for new trial granted at May Term, 1859.

This was an action on the case brought by Ann C. Cook against Seaborn Jones, for building and erecting a mill dam across the Chattahoochee river, thereby wrongfully causing the water of said river to back upon and overflow the premises of plaintiff, lying and situated on said river, above said mill dam.

The defendant pleaded, first, the general issue; second, a license from the former owner of the premises alleged to be overflowed, to erect and build said bridge to its present height; and third, the statute of limitations, that said dam had been erected more than seven years, and that defendant had been in the quiet and peaceable enjoyment of the right to back the water and overflow the land of plaintiff, for and during all that period.

At the trial, plaintiff introduced in evidence a grant from the State to James C. Cook, for the premises overflowed. The last will and testament of said Cook, by which the land in question was devised to Ann C. Cook, his widow, the plaintiff, for and during her natural life.

William H. Mitchell, for and on the part of plaintiff, testified that the land of the plaintiff is bounded on the west by the Chattahoochee river—went to the dividing line between plaintiff and defendant in 1840—he thinks, with his step-father, James C. Cook, who showed witness the line, one that has been so considered for twenty-five years—the fence is on the line—it is some three-quarters of a mile from the city of Columbus—knows but little about water-power—thinks that the water was raised in the channel of the river on plaintiff's line—don't know how much, but thinks some two or three feet; that the defendant erected a dam on the Chattahoochee river, upon his own land, and below the land of the plaintiff, about the year 1839—thinks this dam caused the rise of water on plaintiff's line—went to defendant's mill some time after the dam was broken in the spring of 1841, when the mill was rented to one Bridges; he was grind-

ing with the dam some three or four feet high, as witness thinks, and with a peculiar kind of wheel, thinks it was a cast wheel—don't know how high the dam was, and has not been to the mill in fifteen years—thinks that the water-power of the plaintiff was damaged by the dam at least one hundred dollars. James C. Cook died in the autumn of 1844.

N. Nuchols sworn, for plaintiff, testified that he was a mill-wright—knows all about mills and water-power—knows the line between plaintiff and defendant—went to the line in 1855, when the dam was broken, and the river low, and nailed a measuring rod to the root of a tree at plaintiff's line, in the water, and went there one year after, when the dam was mended, and found the water raised in the channel of the river, on plaintiff's line, five feet eight inches and three-quarters higher than when he measured it a year previously. That the measurements were made when the water in the river was at an ordinary stage, at its average height. Thinks that if plaintiff wished to use or sell her water-power, that the dam would injure its value from one to two thousand dollars, may be ten thousand dollars.

Here plaintiff rested.

Evidence for Defendant.

Richard Powell testified that Dr. Ingersoll built the first dam before the year 1839. Upton erected a dam for Jones in 1839, this dam raised the water higher than the old dam; the dam built by Upton, in 1839, was partially destroyed in the spring of 1841 by a freshet, sixty or eighty yards next the eastern bank, leaving the mill house near the middle of the river. In the fall of 1841 or 1842, Jonathan Bridges, under the direction, and in the service of defendant, moved the mill house to the then eastern bank, and about fifty yards lower down, and the dam was repaired, and a low basin dam was built round to the mill

house. The dam repaired did not supply a sufficient quantity of water, and witness assisted Bridges to place rafts upon the dam to raise the water higher—by this means the water was raised some four or five feet high on the dam—the rafts were placed there some time between 1841 and 1843, but does not know the precise time—does not know when J. C. Cook died, and therefore cannot say whether it was during his life; thinks defendant has expended upon the mill and machinery five or ten thousand dollars. Since the erection of the dam by Upton, there is from 12 to 18 inches fall from the original site of the mill to where it now stands (some fifty steps lower down the river.) The freshet of 1841 did not entirely stop the mill, but it continued to grind a little up to the time the mill house was removed below by Bridges.

Joseph Jefferson sworn, says that he went to the mill in 1845—witness repaired the dam in 1845—the dam as repaired was lower than the old dam, as can be seen by the water falling from the old dam—the new dam is some fifty yards below the site of the original dam on the eastern side of the river, and is lower than the old dam—was planked and the cracks stopped, because the old dam leaked, and had sunk in places, and would not hold water enough for the mill, and has continued to be repaired up to this time.

R. L. Bass testified that he was a civil engineer—examined the premises—took the level of the water on the 24th May, 1858, when the water was running over the dam, and found the level of the water at the dam to be 30-100 of a foot lower than at the line between plaintiff's and defendant's land above. In taking this level, did not take the level of the bottom of the river, owing to the irregularities of the bed of the stream, no accurate level could be taken on a general average, but the level of the surface of the river can be accurately taken, and was taken as stated; upon the day the level was made, the

dam did not back the water to plaintiff's line; from the point to which the back water reached, to plaintiff's line, there was a fall of 30-100 of a foot—from the level of the water in the waste-way under the wheel (which was blasted out) to the level of the water in the pond was about seven feet.

David W. Upton examined by commission, deposed that he knew James Cook in his life time—built a house for him at one time. Witness is a mill-wright, and has worked at the trade since 1822. He was employed by Seaborn Jones to build a mill dam across the Chattahoochee river, just above the city of Columbus, and to erect a grist mill—commenced in May, 1838, and finished the latter part of 1839. He took the level of the river from where the dam was built to the line that divided the land of Jones and James Cook, he took this level in order not to overflow Cook's land by raising the water too high, intended to build the dam five feet high. While he was framing the dam, Cook was there a number of times, had a conversation with him, and informed him that the dam was to be built five feet high, but that it would be better to raise it six feet. Cook at first objected to its being raised six feet, but concluded by giving witness permission to raise it six feet, as he, Cook, did not think that it would materially injure his land above, and the dam was raised accordingly. Jones was absent from home at the time the plan of making the dam six feet high, instead of five, was thus made, with the consent and approbation of Cook. After Jones returned, witness informed him of the change in the dam, and he seemed satisfied with the arrangement.

To Cross Interrogatory.—Dam was finished, according to the best of his recollection, in the latter part of 1839—does not know where the present dam is. The levels were taken to the line dividing the lands of Cook and Jones, from the dam, and the fall was just five feet, and that was the

height first intended for the dam, but by Mr. Cook's consent the dam was built one foot higher—he consented to the erection of the dam, but witness did not state to him that the dam when built would back water on him—if Cook made any mark on the tree, or notified witness or Col. Jones that if the dam backed water on him he would object—witness has no recollection of the same, and does not believe that such was the case. The dam did back water on Cook's land, and he did not object to it, as witness knows—does not know of any of suit being brought by Cook against Jones after the dam was built, but before the dam was framed, Cook threatened suit against Jones, but afterwards, when the dam was erected, he appeared satisfied. The freshet did not wash away the dam, but as to doing away the necessity of the suit, deponent saith not. Did not state to Cook that the dam would not back water on him, but told him that it would.

Here defendant closed.

Plaintiff in reply, proved by *David Wynn*, that in 1845 he worked on the dam for Bridges, the lessee of Jones—put some rafters on it, and planked up the dam, and raised the water some four or five feet on the dam. Did not measure the water, but calculated the depth of the head by the velocity of the wheel, as is customary among millers—placed the rafters over the old dam because it was sunk down in places, leaked and would not hold water enough. Repaired dam in 1851, and made it raise the water higher than before, it having sunk down in parts and leaked. Built another dam in 1855, lower down, by the order of Jones, commenced on the western bank of the river, as near the old dam as he could, and run diagonally across the stream to the island where the mill house now stands, to assist the old dam to hold the water; the new dam was built because it was cheaper and easier to build a new dam than to repair the old one—new dam raises the water about five feet—there are 12 or 18 inches more

fall at the place where the mill now is than at the place where it originally stood. Is well acquainted with the river, and it was over the average height on the 24th of May, 1858.

Benoni Smith for plaintiff, testified that he worked on the dam for Bridges, Jones' lessee, in the fall of 1844, and suggested to Bridges to put flash boards on the dam, but he did not do it. Saw James C. Cook at the mill while he was working on the dam—was stopping the cracks, and planking the dam, because it leaked and did not hold water enough. Bridges tried to work a breast wheel, but could not succeed. Has been a great deal on the river, and on the 24th May, 1848, the river was high, above an average height.

D. W. Upton for plaintiff, deposed that he had been examined in the case by defendant. Witness in his answers then did say, that James Cook consented to the erection of a dam six feet high. Witness meant to say that Mr. Cook came to the mill site one day when witness was framing said dam, designing to build it five feet high—witness said to Mr. Cook that it would be very desirable to have another foot added to the height, to which he objected. Witness then explained to him that he had leveled the river from the mill site up to the place Col. Jones had pointed out as the line between them, and found five feet fall from the bottom of the shoal at the mill site up to the top of the water at said line. Witness further explained to Mr. Cook that he thought the sheet of water which would pour over the dam would be one foot thick, and that taking the dam to be five feet high, the water would be raised one foot above its natural state or level at said line, and by making it one foot higher, the water would be raised another foot at said point. Mr. Cook then said if that were the case, he had no objection, for that he did not believe that the two feet back water would overflow, or at all injure his low grounds—he expressed

fears that in time of a freshet the dam six feet high would cause the water to back upon him and overflow his low grounds, more than it otherwise would do. Witness told him he thought he need not apprehend such a result, as a freshet was less perceptible above a dam than elsewhere, after this statement, Mr. Cook seemed satisfied, and gave his consent to the erection of the dam six feet high. Witness went on and built the dam six feet high, and don't recollect that he ever had any other conversation afterwards with Mr. Cook, relative to the dam. Mr. Cook consented to have the water raised two feet high at the time, but objected all the time to its being thrown back on his low grounds. Both witness and Cook understood that a dam six feet high would raise and back the water two feet at the line between him and Jones, and believes that the consent of Mr. Cook was given to the raising of the dam one foot higher, under the belief that the water would not be raised more than two feet above its ordinary height at said line—when he said that he did not think the six foot dam would injure him, he meant that two feet of back water would not, as witness understood him; witness has no recollection of making the fall seven feet and a half, or six feet and half—his recollection is that it was five feet or thereabouts. He did not report seven and a half or six and a half feet to Mr. Cook, either alone or in the presence of any one or more persons.

Here the testimony closed.

The court charged the jury, who returned a verdict of one thousand dollars for the plaintiff, whereupon defendant moved for a new trial, upon the following grounds, to-wit:

First. Because the jury found contrary to law.

Second. Because the verdict is contrary to evidence.

Third. Because the verdict is contrary to the weight of evidence.

Fourth. Because the jury found contrary to the charge of the court.

Fifth. Because the damages are excessive.

Plaintiff offered to write off the damages to an amount which the court might deem reasonable, if it thought them excessive.

After argument, the presiding judge set aside the verdict and granted a new trial, to which decision counsel for plaintiff excepted.

JOHNSON & SLOAN, for plaintiff in error.

JONES & JONES, *contra*.

Judge BENNING being related to defendant in error, did not preside in this case.

By the Court.—LUMPKIN, J., delivering the opinion.

Are we constrained to reverse the judgment of the circuit judge setting aside the verdict of the jury, and ordering a new trial in this case? So far from it, we concur with him in holding that the finding of the jury was strongly and decidedly against the weight of evidence, not only as to the amount of damages, but the right of the plaintiff to recover at all in this case.

Judgment affirmed.

BOND ET AL. vs. MUNRO.

The act of 1858, "to make uniform the decisions of the Supreme Court of this State, to regulate the reversals of the same, and for other purposes," is, if constitutional, only prospective in its operation.

In Equity, in Lee Superior Court. Tried before Judge ALLEN, at March Term, 1859.

An action of ejectment was brought against the defendant in error for lot No. 14 in the 2nd district of Lee county, at the instance of James Bond, in the names of Ransom Cain and James Morris. At the trial on the appeal the case turned on the question whether a deed made by Cain to Morris, and one by Morris to Bond were void under the statute.—32 Henry 8th, ch. 9th. Judge Allen held the deeds to be void if executed while defendant was in adverse possession, and the jury found for the defendant. The plaintiffs in ejectment carried the case to the Supreme Court, and it came on to be heard at June Term, 1857, (see 23 Ga. Rep. 82) when a majority of the court (Judge Lumpkin dissenting) held that the statute 32 Henry 8th, ch. 9th, was not of force in this State, and granted a new trial. After the new trial was awarded by the Supreme Court, the legislature passed an act to make uniform the decisions, by which it was enacted that, “From and after the passage of this act the decisions of the Supreme Court of this State which may have been heretofore or which may hereafter be made by a full court, and in which all three of the judges have or may concur, shall not be reversed, overruled or changed; but the same are hereby declared to be and shall be considered, regarded and observed by all the courts of this State as the law of this State, where they have not been changed by the legislative enactment, as fully and to have the same effect as if the same had been enacted in terms by the General Assembly.”

This act was assented to, the 9th of December, 1858.

On the 14th December, 1858, a compromise was made of the ejectment suit between Munro, and Lanier & Anderson, attorneys-at-law for James Bond. Munro gave his note for \$2000 to the attorneys, payable to Bond, and

the attorneys, for bond, agreed that Bond should give to Munro a quit claim deed for the lot in dispute, and that a verdict in the ejectment suit was to be given for Munro.

Afterwards Munro filed this bill in equity to set aside said agreement and to have his note cancelled or returned to him.

The bill charges that Bond and his attorneys knew of the passage of the law of 1858 and concealed it from complainant and thus entrapped him into this settlement.

The bill alleges that complainant sold his plantation, including the lot in dispute, to Willis A. Jones, and that for this lot Jones gave his conditional note for \$2531 25, and that Munro turned over this conditional note to Lanier & Anderson, as collateral to his own note for \$2000.

The bill prays that the agreement of compromise may be cancelled and the notes returned to him, and Bond may be enjoined from trading the notes. The bill was sanctioned and the injunction prayed for granted. The defendant Bond answered the bill. His answer denies that the compromise was brought about by the superior knowledge of himself or his attorneys. That the law was a public one, and complainant had as full opportunity of being informed as defendant, and it was not the duty of defendant to inform complainant as to the law, or what his rights might be under it. The other defendants answered the bill, but their answers are not material to the question upon which the case turned. There was a demurrer to the bill and a motion to dissolve the injunction. Judge Allen overruled the demurrer and refused to dissolve the injunction, and defendant excepted. Lanier & Anderson filed in the court below their affidavits denying any imposition upon complainant and also denying that they knew or had heard of the passage of the act of 9th December, 1858, previous to the compromise with complainant.

Bond et al. vs. Munro.

MCCAY & HAWKINS, for plaintiff in error.

VASON & DAVIS, *contra*.

By the Court.—BENNING, J., delivering the opinion.

Did the court below err in overruling the demurrer? We think so.

If there is any equity in the bill, that equity is due to the act of the legislature, referred to in the bill. This proposition may be assumed. That act is in the following words:

“AN ACT to make uniform the Decisions of the Supreme Court of this State; to regulate the reversals of the same, and for other purposes.

Sec. 1. Be it enacted, That from and after the passage of this act, the decisions of the Supreme Court of this State, which may have been heretofore, or which may hereafter be made by a full court, and in which all three of the judges have or may concur, shall not be reversed, overruled or changed; but the same are hereby declared to be, and shall be considered, regarded and observed by all the Courts of this State, as the law of this State, where they have not been changed by the legislative enactment, as fully, and to have the same effect, as if the same had been enacted in terms by the General Assembly.

Sec. 2. Repeals conflicting laws.

Approved, December 9th, 1858.”

Can the bill derive any aid from this act? The plaintiffs in error say no. They say, first, that the act is unconstitutional; secondly, that, if not unconstitutional, it is only prospective in its operation, and, therefore, that it does not apply to this case.

We think it true that the act is only prospective in its operation, and, therefore, that it does not apply to the case. Whether it is not also unconstitutional, is, therefore, a question which need not be considered.

It is a general rule, in the interpretation of statutes, that they are to be so interpreted, that they shall not affect any case that was in existence before their passage, unless they expressly, or, by necessary implication, mention that case. This statute does not expressly, or by necessary implication, mention any case that was in existence before its passage. It, on the contrary, may easily and naturally be taken as referring only to cases that might arise subsequently to its passage. The sense of the statute may with ease be taken to be this—that decisions made, or to be made, by a full court, shall, from and after the passage of this statute have the force of legislative enactments, until the legislature interposes and says that they shall not have that force. The decisions are to have this force from and after the passage of the statute. Therefore, even those of them that were made before the passage of the statute, are not to have this force from the time when they were made, but only from the time when the statute was made. For example, take the decisions made by a full court, that this statute of Henry the 8th is in force. They were decisions made before the passage of this statute.

The operation of the statute, on those decisions, is, to make them legislative enactments, from and after the passage of the statute, not from and after the date of the decisions. The operation is just what it would have been if the language of the statute had been this: "The statute of Henry the 8th (or certain parts of it) shall, from and after the passage of this act, be in force." Would any one say, that a retroactive operation for the statute could be got out of such language as this? So, neither can such an operation be got out of language, only the equivalent of this. We think, then, that this statute has no application to this case, for this case arose before the passage of the statute.

Judgment reversed.

BERRY & MEHAN vs. WINTER.

An answer that admits enough of the bill to entitle the complainant to the decree he prays for, is sufficient, whether it answers all of the bill or not.

In Equity, in Muscogee Superior Court. Decision by Judge WORRILL, at May Term, 1859.

The points adjudicated will be fully understood by the following opinion pronounced by the Court.

MOSES, represented by JOHNSON & SLOAN, for plaintiffs in error.

DOUGHERTY, *contra*.

By the Court.—BENNING, J., delivering the opinion.

A number of exceptions were filed to the answer of John G. Winter. The judgment of the court below, as to these exceptions, was, that they were all good, except two. To that judgment Winter excepted, and the question is, was the judgment right?

Berry & Mehan, the complainants in the bill, were creditors of the Bank of St. Marys. The object of their bill was to get satisfaction of their debts out of the defendants. The prayer of the bill was, that defendants might “be decreed, jointly and severally, to pay to the complainants the amount of their debt against said bank.”

Now, if the answer of John G. Winter admitted enough to entitle the complainants to this decree, as against him, it was sufficient, whether it contained a response to every allegation in the bill or not. The only reason why any allegation in a bill is to be answered is, that the com-

plainant may obtain evidence on which he will be entitled to a decree for the relief for which he prays. When, therefore, enough of the allegations are admitted by the answer, to furnish the complainant with sufficient evidence, to entitle him to the decree he prays for, the other allegations become immaterial, and immaterial allegations need not be answered.

The question then becomes this: does the answer of John G. Winter admit enough to entitle the complainants to the decree against him, which they pray for? And we think that it does. It admits that the bank suspended specie payments in April, 1852, and that it has never resumed them since; it admits that the complainants are creditors of the bank; it admits that J. S. Winter & Co., and John G. Winter, are each largely indebted to the bank—are each indebted to the bank in an amount much greater than that in which the bank is indebted to the complainants; indeed, the answer says, that John G. Winter offered, long ago, to give the complainants his own note for their debt on the bank. What more do the complainants need, than is here admitted? Nothing; for here is enough admitted to authorize them to demand a decree against Winter for the amount of their debt against the bank—the decree for which they pray.

We think, then, that the answer was sufficient; that as enough of the bill was admitted by the answer to entitle the complainants to the relief they prayed for, it was a matter of no consequence whether the rest of the bill was or was not answered.

Judgment affirmed.

Judge STEPHENS did not preside in this case, owing to indisposition.

HILL (A SLAVE) vs. THE STATE.

The indictment charged the defendant as a principal. The evidence showed that another inflicted the mortal blow—the prisoner being present, aiding and abetting. *Held*, That the variance was immaterial ; both being principals in law, as well as in deed ; and the stroke of one being in law the stroke of the other.

Murder, in Decatur Superior Court. Tried before Judge ALLEN, May, 1859.

Hill, a slave, the property of William Perkins, was indicted for the murder of Margaret Saddler.

The jury found the defendant guilty. His counsel moved for a new trial on the following grounds :

1st. Because the court erred in compelling the defendant to testify in the case of the State against Grif, a slave, indicted and tried for the same offence, upon a separate bill of indictment.

2nd. Because the court erred in refusing to admit the evidence, as taken down in writing, that the defendant gave in on the trial of said Grif.

3rd. Because the court erred in refusing to permit others to prove what defendant's testimony was on the trial of Grif.

4th. Because the court erred in refusing to admit in evidence the record of the written evidence in the case of the State against Grif, after the Solicitor-General had withdrawn all objection to the admission of the record and verdict in said case, and said record and verdict were allowed to go the jury.

5th. Because the court erred in admitting Martha Saddler to testify as to the acts of other persons than defendant, and whose names were not in the indictment, and

against whom in connection with the acts of defendant there was no charge.

6th. Because the court erred in allowing Martha Saddler to testify that defendant struck her with a stick.

7th. Because the court erred in permitting the Solicitor-General to prove by a witness, John Saddler, that he was struck by some one, whom witness did not know, at the time of the killing, and to show to the jury the scar on witness' head received from the blow.

8th. Because the court erred in not entering a *nolle prosequi*, upon the indictment against defendant, before compelling him to testify in the case of the State against Grif.

9th. Because the court erred in holding that the effect of compelling defendant to testify against Grif, was not a *nolle prosequi* as to him on the indictment then pending against him.

10th. Because the court erred in admitting evidence of the acts of any other persons, or the acts of defendant as to other persons than deceased.

11th. Because the court erred in allowing counsel for the State, in his argument before the jury, to assail the position of counsel for the defendant.

12th. Because the court erred in permitting counsel to assail Col. Sims' position, by remarking "that Col. Sims, in his defence of the boy Grif, but the day before, had contended that defendant was guilty and not Grif, and on that trial that Grif was the guilty party and not Hill." No objection made at the time to the remarks of counsel for the State.

13th. Because the court erred in charging the jury, that if they were satisfied that deceased came to her death by violence at the hands of any person, and that killing was murder, and the defendant was present and participating and aiding and assisting in the killing, then he was guilty of murder.

14th. Because the evidence was conclusive that deceased came to her death at the hands and by the acts of Grif, and of Grif only, and defendant could not possibly be guilty.

15th. Because the verdict was contrary to law and the evidence, and without evidence.

The court, after argument, overruled the motion and refused to grant a new trial, and counsel for prisoner excepted.

LYON & CRAWFORD, for plaintiff in error.

Solicitor-General, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

We affirm the judgment of the court below on all the grounds taken in the motion for a new trial. And there is but one which we think requires any comment. Hill was indicted as a principal, and the evidence makes it probable that Griffin struck the blow or blows which killed Mrs. Saddler. Can Hill be convicted under the indictment?

Mr. Justice Foster says, that the identity of the person supposed to have given the stroke is but a circumstance, and a very immaterial one. The stroke of one is considered in law, and on sound reason, as the stroke of all. "*They are all principals in law, and principals in deed.*" And the case which elicited these remarks was this: The indictment charged that A gave the mortal blow, and that B and C were present aiding and abetting, &c.; but on the trial it appeared that B struck and A and C were present, aiding, &c. It was held that this was not a material variance. For that the stroke was adjudged in law to be the stroke of every one; as much so as if all three had held the weapon and had altogether struck the de-

ceased.—(See 1 Phil. on Ev. 4 Amer. Ed. 204; also, note 398, p. 496.)

Considering the participation of Hill in this tragedy, and that whether convicted as principal in the first or second degree, the offence is murder and the punishment the same, we affirm the judgment on this ground as well the rest.

Judgment affirmed. .

BENNING, J., concurred.

STEPHENS, J., dissenting.

I did not concur in the judgment in this case, but reserved to myself the privilege of writing a dissenting opinion or not, according as reflection might confirm my objections or remove them. The result is that I feel constrained to adhere to my dissent.

There are two points on which I differ with a majority of the court.

1. They held that under this indictment evidence was admissible over the objection thereto by the defendant, showing that he was guilty, not as principal in the first degree, but as principal in the second degree. The indictment was for murder generally,—that is to say, without any discrimination between principal in the first degree and principal in the second degree,—in effect, therefore, an indictment against the accused as principal in the first degree. I hold, that under such an indictment, no evidence is admissible to show that the accused was guilty as principal in the second degree, or, in other words, that under an indictment against one as principal in the first degree, there can be no conviction of him as principal in the second degree, and of course no evidence admitted showing him to be such. The reason is briefly this: The indictment does not give notice of the nature of the proof, and so, does not afford the accused opportu-

nity to prepare his defence. He comes to trial prepared to meet the case stated in the indictment, but he is met by a different case of which he has had no notice. The only possible mode of escaping from this reasoning is by assuming, as the majority of the court hold, that there is no real difference between the two cases; that principal in the first degree and principal in the second degree are substantially the same. This seems to me to be untenable doctrine. I shall not go into any examination of authorities outside of our Penal Code. I think this settles the question. It defines a principal in the first degree (Cobb's Dig., p. 781,) to be one who is the "actor or absolute perpetrator of the crime;" and a principal in the second degree to be one who does not himself perpetrate the crime, but is present, either actually or constructively, aiding and abetting the other. Why should the Code be so careful to distinguish between them, unless it intended to recognize or to establish a difference? Has the Code made "a distinction without a difference?" Again, the Code (same page) enacts that (except where there is a different provision in particular cases) the principal in the second degree and also an accessory before the fact, shall receive the same punishment as the perpetrator of the crime. If the two principals are substantially the same, where was the necessity for providing *specially* that they should receive the same punishment? Does not the provision imply that *without it* the punishment which is specified for the perpetrator of the crime, would not be applicable to a principal in the second degree? The framers of the Code did a very superfluous thing, unless they believed they had made so clear a difference between the two characters that a principal in the second degree would not be included in a general provision for punishing the perpetrator. Now if he is not included in a provision for punishing the perpetrator, how can he be included in an indictment charging or accusing the perpetrator? If he is not in-

cluded in the one case, he can not be included in the other, and for the same reason in both cases—because he is *not* the perpetrator. A provision for punishing the perpetrator, and an indictment accusing the perpetrator, do not extend to a principal in the second degree, because the term “perpetrator,” or any of its equivalents, does not include or apply to a principal in the second degree. Hill is *indicted* as the *perpetrator* of murder—to convict him as principal in the second degree, is to convict him of that which has not been charged against him, and, therefore, I say such a conviction would be inadmissible under such an indictment. There is no analogy between such a conviction, under such an indictment, and a conviction of manslaughter under an indictment for murder. Murder *includes* manslaughter with something else superadded, to-wit: malice. A charge of murder is a charge of manslaughter and more. One convicted of manslaughter under an indictment for murder, is not convicted of what has not been charged against him. A case of manslaughter *falls short* of the charge, but it is directly *in the line of it*, and is therefore admissible. With the element of malice added to it, it would come up to the full measure of the charge. So an indictment for an assault with intent to murder, includes an assault; and there may be a conviction (and of course there may be evidence admitted to procure it) for an assault, under such an indictment. But on principle there could not be a conviction for *battery* under such an indictment, for the charge of battery is not included in a charge of an assault with intent to murder, and to convict of battery would simply be to convict of that which had not been charged. This last instance affords a clear illustration of what I am attempting to illustrate. Now the two sorts of principals in crime are so far from including one the other that they are essentially incapable of being combined in the same person. Neither one of them can possibly be the other.

To accuse a man as being the one and convict him as being the other, is simply to charge him with one thing and convict him of another essentially different thing—not different it may be in turpitude nor in punishment, but different in *description, in the circumstances of its identity*, in short, different in the *proof* which supports it. Any indictment which disregards all these differences, and accuses a man as being the perpetrator of an offence, when the true case to be proven under it is that of a principal in the second degree, does not serve the purpose of an indictment, for it does not state the offence to be proven under it, in such a manner as that either the accused or the jury can understand the nature of the offence to be proven. On the contrary, it states a different case, *inconsistent* with the one to be proven, and so *misleads* instead of guiding, lulls the accused into a deceitful security, instead of waking him to preparation. The charge that he is the perpetrator, is an assertion that he is *not* principal in the second degree; and when he comes to his trial he finds that he is to answer for an offence of which the indictment had assured him that he was *not* guilty. I do insist that this is worse than no indictment at all. Without any specification of crime, the accused might feel the necessity of reviewing his whole life and of coming prepared as best he could, upon all possible points of attack. Being warned of nothing in particular, he would naturally prepare for everything. But when accused of one thing, while the true intention is try him for another *inconsistent* thing, he has no warning but the *false* one that he need *not* prepare for defence at the only point where the attack on him is to be made. This is deceitful. It would be less cruel and more manly to call upon the accused by one general summons to answer for all the crimes of his life. But I am told that this is all *theory*—that *practically* there is no difference between a principal in the first and second degrees—that “murder is murder”

after all. True, there is no practical difference *after conviction*, for in either case the convict can but die, and die he must: So, too, there is no practical difference, after conviction, between a conviction for murder and a conviction for arson in a town, but I apprehend that *on the trial* of an indictment for arson, the accused would have a very *practical* surprise, if he should be met with proof, not that he had burnt a house, but that he had killed a man. Let me put a case to show the *practical* difference *on the trial* between the two kinds of principals. Let it borne in mind that the "presence" which is necessary to make one a principal in the second degree, may be a constructive presence—he may be a mile from the scene of the perpetration, yet he is construed to be present, if he, at the time, is actively aiding and abetting the perpetrator. Suppose, now, a man is indicted as the perpetrator of murder upon a person named in the indictment. He knows that he is not guilty; he knows that he never was in the presence of the person killed; he knows that the charge can not be sustained without perjury, and he goes to trial feeling that he needs no preparation, and in full reliance that the fact charged can not be proven; that no witness can swear that he perpetrated the crime. It turns out that no witness does swear it; but it is offered to be proven that *another man* perpetrated the crime; that the accused was seen in earnest conversation with the perpetrator near the place and time of the killing; that they parted, the perpetrator going one way and soon after performing the deed of crime, and the accused going another way for a short distance and then stopping in a place sheltered from observation and assuming the attitude of a *watcher*. The accused protests against the admission of this proof and declares that he could explain it all up if he had expected it to come against him—that he knows a witness who overheard the earnest conversation and knows it to have been perfectly innocent, even virtuously indig-

nant; that he parted from the true criminal in anger, and that his attitude of watching was taken, not to aid murder, but to look out for a friend who had promised him a secret and yet an innocent meeting at that spot. What reply could be made to this appeal? The accused tells the court: "I have not come prepared to explain the circumstances which seem to point to me as a confederate of the perpetrator of this crime, for your accusation assured me that I was *not* a confederate, but the perpetrator himself; assured me that I should *not* have to explain any watching at a distance, for that I was *not* at a distance but at the *spot* of murder, doing the deed with my own hands. I have not, in short, come prepared to meet the case you seek to prove, because that case is inconsistent and incompatible with the case you have alleged."

2. The proof in this case clearly and confessedly shows the accused not to have been the *perpetrator* of the crime. He struck no blow upon the deceased, and had nothing to do with her, but was engaged in a scuffle with other persons, while the murderer performed his deed upon a helpless woman. I do not think the proof shows even that the two negroes had any common intent of murder. Their mission was probably one of lust, to be gratified peaceably if possible, forcibly if necessary. The purpose of murder did not probably arise in the mind of the perpetrator himself till it was excited in the heat of the contest with his resisting victim; and is not shown ever to have been in the mind of Hill at any time. He did not *help* the other negro, but was himself engaged with another woman, whom he neither killed nor tried to kill, and who was a witness against him on the stand. The evidence is far from satisfying me that Hill was guilty of murder in either degree, and it is indisputable that he was not principal in the first degree. The verdict is, that he was guilty as principal in the first degree. The verdict, therefore, is against the evidence. The verdict is not the

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truth. I do not know what more can be said against any verdict, or any better reason for setting any verdict aside; and I think this one ought to have been set aside.

TUCKER vs. RESPASS.

GRIFFIN, EXR. ET AL. vs. THE SAME.

1. An affidavit of illegality, on the ground of payment, was put into a *fi. fa.* and overruled. Afterwards a motion was made to have the *fi. fa.* entered satisfied, as paid. *Held,* That the judgment overruling the affidavit was a bar to this motion.
2. Whether the sheriff should or should not, receive an affidavit of illegality, is a question he must determine for himself; and if he determines it wrong, he will be liable to the injured party.
3. Attached to a *fi. fa.* was a paper which purported to be a copy of a judgment overruling an affidavit of illegality, the copy being signed and certified by the clerk, but not sealed. *Held,* That the paper was sufficient notice to the sheriff, that one affidavit of illegality had once been received and that he ought not to receive another, if, indeed, any notice was necessary.

Rule, against sheriff. Motion to have *fi. fa.* returned and entered satisfied. Decision by Judge ALLEN, at Baker superior court, May Term, 1859.

On the 17th of June, 1847, a writ of *feri facias* was issued from the superior court of Baker county, in favor of Josiah Respass, against William H. Luckie, as principal, and Anderson D. Moore and Carna Burnam, as securities. It was soon afterwards placed in the hands of the sheriff of Baker county, and by him levied upon one-half of lot of land No. 264, in the 7th district of Baker

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county, as the property of A. D. Moore. This levy bears date November 1st, 1847. On the 17th of the same month, Moore filed his affidavit of illegality to the *fi. fa.*, alleging as his ground of illegality, that the note on which said *fi. fa.* was founded was his own property—that he had purchased the note and given his obligation for it, and that he neglected to make the proper defense upon the trial. At the December term, 1847, of Baker superior court, this affidavit of illegality was dismissed and the *fi. fa.* ordered to proceed. The next entry upon the *fi. fa.* is as follows :

Levied and claim interposed, by A. M. Smith, Feb. 10th, 1848.

GEO. W. COLLIER, Sheriff.

At the December term, 1848, of the court aforesaid, the levy was dismissed by order of plaintiff's attorney. On the 17th December, 1848, Jas. G. Johnston, deputy sheriff, levied the *fi. fa.* on two lots of land, (numbers not known,) as the property of Carna Burnam. The record does not show that this last levy was, in any manner, disposed of. The next entry that appears on the *fi. fa.* is as follows: "Levied the within *fi. fa.* upon lot of land 248, in the 7th of Baker, November 30th, 1852."

(Signed.)

HENRY J. SLAPPEY, D. Sh'ff.

An affidavit of illegality was taken on the 6th of December, 1852, by William E. Griffin, executor of Anderson D. Moore, alleging that the *fi. fa.* was proceeding illegally against him as executor, on the following ground: Because he was advised and believed that Moore, in his life-time, and after the overruling of a former affidavit of illegality taken by him, paid off and discharged said *fi. fa.* At the May term, 1858, issue was joined, and at the same term the cause was called and the affidavit withdrawn by the affiant's attorney, and an order taken that the sheriff proceed with the *fi. fa.*

On the 28th day of August, 1858, William E. Griffin filed another affidavit of illegality, alleging that the *fi. fa.*

was fully paid off and discharged by Moore, in his lifetime; and at the following November term, this affidavit, after argument had, was overruled and the sheriff ordered to proceed with the *fi. fa.*

Afterwards another affidavit of illegality was made by John Lyon, attorney for defendant, on the ground that the *fi. fa.* had been paid, which affidavit, after argument had at the May term, 1859, was also overruled.

At the same term of the court, a rule *nisi* was taken against Wm. E. Tucker, the deputy sheriff, (into whose hands the *fi. fa.* had been placed,) calling on him to show cause why he should not pay over, principal and interest, due on said *fi. fa.* At the same term a motion was made by Griffin, the executor of said Anderson D. Moore, calling on the plaintiff in *fi. fa.* to show cause why said *fi. fa.* should not be marked as satisfied, said Griffin contending that the entries on the *fi. ja.* raised a presumption of payment. The certificates of the clerk which were attached to the *fi. fa.* when it went into the hands of the deputy sheriff, Tucker, and which showed that one prior claim of illegality had been withdrawn, and another one overruled by the court—did not have the seal of the court affixed to them. The sheriff contended that said certificates were not notice to him that previous affidavits of illegality had been made. Both of these motions were argued together. The court granted a rule absolute against the sheriff, and refused to have the *fi. fa.* entered as satisfied. To the former decision the sheriff excepted; and to the latter the defendants in *fi. fa.* excepted; and by agreement of parties incorporated both decisions in one bill of exceptions, and now assign the same for error.

LYON, for plaintiff in error.

VASON & DAVIS, *contra.*

By the Court.—BENNING, J., delivering the opinion.

This case consists of two distinct cases ; cases, however, which have many things in common. One of the two grew out of a motion, that the *fi. fa.* should be entered satisfied ; the other, out of a rule against the sheriff, that he should pay over to the plaintiff in the *fi. fa.* the amount of the *fi. fa.*

The two cases will be considered separately, the one growing out of the motion first.

The motion was made by Griffin, the executor of Moore, a defendant in the *fi. fa.* The motion was preceded by a long preamble, stating the grounds on which the motion was put. Those grounds may all be resolved into one—that the *fi. fa.* had been paid off.

The motion was answered by Respass, the plaintiff in the *fi. fa.* And the answer, in the first place, denied that the *fi. fa.* had been paid off ; and, in the second, stated a judgment of the court, which, the answer insisted, determined that the *fi. fa.* had not been paid off.

The court overruled the motion. Was it right in doing so ? That is the question.

There were several objections to the decision, but they may all be reduced to two ; one, that the question of payment was not submitted to the jury ; the other, that the decision was contrary to the evidence.

We are not prepared to say, that the court is *bound*, to call in a jury in a proceeding so peculiarly for the court, as is a motion of this kind ; we much doubt whether the court is. Supposing the court not to be, the decision of the court below, it is clear, was right ; for, in the evidence, there was nothing to show that the *fi. fa.* had been paid off, and much to show that it had not been paid off.

If, however, we concede that the general question of payment was a question for a jury, and, therefore, that it was an error in the court to decide the question, yet that

can be of no avail to the plaintiff in error, if the other question was one for the court, and the court decided it correctly.

And the other question was, beyond a doubt, a question for the court, for it was a question of former recovery—a question whether there existed a judgment determining that the *fi. fa.* had been paid off; and a question of former recovery is to be tried by the record; and questions to be tried by the record, are for the court, not for the jury.

This question, then, being one for the court, was the court's decision of it, right? Did the evidence show, that, as the court held it did, there was an existing judgment, to the effect that the *fi. fa.* was still unpaid?

The evidence showed that there had been filed in the case, as many as four affidavits of illegality, of which, the first was filed by Moore, and the other three by his executor, Griffin; that of these three, each had for its ground, payment; that the first of the three was withdrawn, and the last was still pending; but that in the second, there was a judgment which was as follows: "Upon hearing of this case, it is ordered that that the same be overruled, and said *fi. fa.* do proceed." What was the case?—a case in which the only question, so far as appears, was, whether the *fi. fa.* had been paid off. Payment was the only ground taken in the affidavit. No other ground, so far as appears, was brought into the case. We are to presume that the decision was a decision of the question presented by the pleading, which was the affidavit, and the only question presented by that, being the question of payment. We are to presume, that that was the question decided. The decision was one overruling the affidavit. Therefore, it was a decision that the *fi. fa.* had *not* been paid off.

1. We think, then, that the court was right in overruling the motion to have the *fi. fa.* entered satisfied.

The rule against the sheriff, was at the instance of Respass, the plaintiff in the *fi. fa.* The rule called on the sheriff to show cause why he should not be compelled to pay over the amount of the *fi. fa.* to Respass.

The sheriff answered the rule; and, in the first place, insisted that the *fi. fa.* had been paid off. But the evidence did not support him in this position. It was the same as that already considered in the other case; and that showed, as we have seen, that the *fi. fa.* had not been paid off.

The sheriff, in the next place, insisted on several things which amount about to this: 1st, that a sheriff is not clothed with the power to determine what is, or what is not, a sufficient ground for rejecting an affidavit of illegality; and, therefore, that he was, in this case, bound to receive all that came; 2dly, that if a sheriff is clothed with this power, yet that he ought not to reject a second affidavit, unless he has evidence sufficient to satisfy him that it is a second one; and that the evidence in this case was not sufficient to satisfy him, that the affidavit he received, was a second one; that, consequently, it was his duty to receive that affidavit; and, if so, then, that he was prevented by the affidavit from proceeding to make the money on the *fi. fa.*

As to the first of these two grounds: The sheriff, it is true, is not a judicial officer, but neither is the act referred to—the receiving or rejecting an affidavit of illegality—a judicial act. That act determines no right, and the essential characteristic of a judicial act is, that it determines some right. Acts of this kind differ in no essential respect from many other acts which sheriffs are, beyond question, bound to do. Sheriffs must determine, in many cases, whether they will receive or reject bonds; in many cases, whether they will, or will not levy on certain property; in many cases, whether process is, or is not, valid; in many other cases—many other questions. Even pri-

vate persons, frequently have to determine important questions for themselves. When a man is attacked by another, whether he will or will not be justified in killing his assailant, is a question he must determine for himself. And so, in many other instances. Especially is this true, of a man who is executor, administrator, or trustee.

2. We think, then, that this was not a good ground. We think, that it is for the sheriff to determine whether he will receive or reject an affidavit of illegality; and that if he determines the question wrong, he will do so at his peril.

Was the second a good ground? It suffices to say of that ground, that the sheriff had very sufficient notice of the previous affidavits of illegality. Copies of the judgments overruling two of these affidavits, were attached to the *fi. fa.* at the time when he received the affidavit of illegality in question—copies, certified by the clerk. If this was not sufficient notice, what would have been? The seal of the court, it is true, was not to the copies, but the act of 1819, does not require official certificates to be under seal.—Pr. 210.

3. We think, then, that if the notice was necessary, the sheriff had notice.

Judgment affirmed.

TRIBUTE OF RESPECT TO THE MEMORY OF
JOHN LAMAR.

SUPREME COURT ROOM, MACON, July 19, 1859.

In response to the committee offering condolatory resolutions upon the death of JOHN LAMAR, Esq., Judge Lumpkin spoke as follows:

I regret gentlemen of the Committee and of the Bar that I am not this morning in a condition either of body or mind to respond, in terms worthy of the occasion, to the eloquent tribute to which we have listened.

It would be a pleasure to me, under more propitious circumstances, to portray in suitable colors the virtues of the deceased; and to hold him up for the imitation of survivors. I knew him well, and none knew him but to love him. Suffice it to say, that during the whole period of his brief existence, from infancy to manhood, he always did his duty; always acted wisely and well. And success rewarded his fidelity. He bore off without a rival the highest collegiate honors; and already at the Bar and in the world; as a lawyer and a man of business, he exhibited a maturity of judgment and habits of system and punctuality which were fast attracting toward him, the public confidence and respect.

But I forbear to occupy more of your time.

Have you watched a favorite tree which you have planted and nurtured with assiduous care? The time has come for it to realize your hopes, and reward your pains. In early spring it puts forth the blossom and leaf, and then the young fruit appears. How lively your joy, that your fond expectations are about to be realized! But by and by decay begins to manifest itself—the leaves dry up—the young fruit withers on the boughs—the tree

dies. It may be the untimely frost has done this mischief, or some cankerworm at the root may have drained its life-juices, or sent poison through its pores—or the first hot rays of the summer's sun may have scorched or scathed the tender tree. So it is with our young brother. Parental care had followed him from childhood to manhood. He gave evidence of remunerating seven-fold all the watchfulness and anxiety of his doting family—when the stern and inexorable decree summoned him hence.

What a mystery such occurrences would make this life! all a maze without a plan—were it not for the sure word of the Bible; which teaches that in another state, past, present and future will be explained, and we shall be able to trace the chain that connected them indissolubly together. For that day we must wait. Moses, the faithful law-giver and leader of Israel, was permitted to ascend the mountain top and cast a longing, wishful eye over the vine-clad hills and luxuriant valleys of Canaan, but was not suffered to enter the land of promise. How many perish on this side of the Jordan of their hopes! How often are we reminded that “the fashion of this world passeth away!” The sturdy oak which sheltered the weary traveler for generations is finally prostrated by the mountain storm. The traveler searches on the banks of the Euphrates for the site of that city concerning which its proud monarch vauntingly said, “Is not this great Babylon which I have built?” Man and all the proudest monuments of human genius disappear, but the word of God endureth forever!

What can we say to those whose affections are robbed of the treasure to which they clung so closely and so long? If the sincere sympathies of friends be any consolation, they have it. Those friends have thought of your midnight vigils in nursing your sick son—of the scalding tears which bedewed his lovely form—paralyzed in death—and they have wept with you. All we can say is, take

Tribute of respect to the memory of Judge Cone.

comfort from the thought that though your darling boy cannot return to you, you may go to him. Would you tear him away from the society of Heaven?—from the companionship of the youthful martyrs, Abel and Stephen, and all the *elite* of the Spirit World? True, he will stand no more at the bar of this court. But he associates with Paul, who made the most august Judge of his day tremble as the noble advocate reasoned before him of “righteousness, temperance, and judgment to come!”

God grant that when we die—as “die we may, *die we must*”—our last end may be that of our heroic young brother!

TRIBUTE OF RESPECT TO THE MEMORY OF
JUDGE CONE.

At the November Term of the Supreme Court, held at Athens, the following report and resolutions were introduced by Junius Wingfield, Esq. :

For many years previous to his death, Judge Cone had been regarded as one of the most eminent Jurists in the State. Such a reputation was well deserved. He was a man of far more than ordinary legal learning, when compared generally with the profession. He had brought to the study of the law a vigorous, well-disciplined mind, and his thorough mastery of its principles, enabled him to discriminate in practice with a clearness which made it always interesting to hear him. He displayed, in a most eminent degree in his practice, that strong sense, that sound judgment which intuitively seized the strong points of his case, and there he rested. No man ever had

a more contemptuous disregard for what is known in the profession as "fancy points."

By force of his talents he was elevated to the Bench, and afterwards to the State Senate, in both of which positions he maintained his high reputation as a lawyer. In his intercourse with the members of the Bar he was kind, and contributed to its social enjoyment, to a degree which made his presence always acceptable to his professional brethren.

No man contributed more than Judge Cone, on the Circuit, to relieve the life of the lawyer of its drudgery. His conversation always sparkled with wit and humor.

His death has left a wide chasm in our ranks.

Resolved, That in the death of Judge Cone, the Bar has lost one of its best members, and the State one of its ablest men.

Resolved, That we sympathise with his family in their bereavement.

Resolved, That the resolutions be spread on the minutes, and that a copy be presented to the family of the deceased.

Judge Lumpkin in reply said :

We are assembled, my brethren, to pay the debt due to a deceased friend. We come to honor one who, during his life, was an honor to his profession. We come to lay claim to his reputation as a part of our own ; as an accession to that invaluable estate, which is to pass from generation to generation, to all future time.

And yet how fleeting is the fame of a lawyer. Though the fruit of a life of labor, it passes off with his form from the forum. It dies away with the sound of his voice. Poets and historians perpetuate the names and exploits of the warrior and statesman ; the sculptor lives in his own imperishable marble ; the painter is fresh for ages, in the glowing colors of his canvass, but the advocate upon whose lips courts and crowds hang with rapture and delight ; whose imagination startled the audience ; whose

Tribute of respect to the memory of Judge Cone.

wisdom convinced, and whose wit flashed like the electric spark, is lost to memory almost as soon as to sight. The attorney leaves behind no Lodi, Marengo, or Austerlitz. No shaft crowns the Place Vendome, to tell the tale of the battles fought, the victories won and the ceaseless strains and struggles of his professional life.

True, the bench and bar will, occasionally, in some leisure hour, discourse of his wonderful tact and talent in the management of causes. But the voice, the look, the gesture, the impassioned feeling, the burning words, the searching thought, the soaring fancy, the scathing sarcasm, who can adequately portray these, for the admiration of posterity. And yet, these are the frail foundations of the lawyer's fame; born of, dying with the occasion which produced them; Digests and Form books will be cited by the names of their authors, when the lawyer, whose mind furnished the matter, will be forgotten. And yet, how often do we see the practitioner, with exhausted energies, press forward to grasp a shadow, which still allures him, as though his space in the memory of men, was not a point, his time on earth—a moment.

Judge Cone entered upon the world unfriended and unknown, without the advantages of birth or fortune, except that best and most prized of all New England portions, a good education. Like Sanders and Kenyon, Ten-terden and Lyndhurt, in England, and Cheves and McDuffie, and an innumerable list of distinguished legal worthies of this country, he rose from comparative obscurity to eminence and public favor, entirely upon his own merits. He boasted of his Puritan origin. He often referred, with pride, to the fact, that his ancestors came over to this country, with the colony planted by Lord Say and Seale, and that the patrimonial farm, in East Had-dam, Connecticut, had descended in a direct line in his family, for more than two centuries.

Judge Cone was not an eloquent man, in the ordinary

acceptation of that term. He lacked a musical voice, and the nervous sensibility—which are the gifts of nature—and without which, it is impossible to reach the highest achievements of oratory. The vivid imagination, too, was wanting, which delights in poetical imagery, or in rhetorical flourishes; in painting the passions, or exciting them into action. He was not addicted to a rich and gorgeous diction, to color his thoughts with the rainbow tints, the lights and shadows of the universe around him, the seen and unseen world; but, for perspicuous and methodical statement, and irresistible reasoning, I have never known any one to surpass him. His promptness of perception enabled him at a glance to separate the point in issue from all extraneous matter; to disentangle what was complex, to fix upon the true question involved in the case, and to shed an effulgence of light upon it, making it an illuminated path of discussion, where all before was beclouded in darkness and obscurity. If I were asked what I considered the most striking quality of Judge Cone's mind, I should answer, unhesitatingly, a diamond-like clearness of perception, through which all objects appeared simple and uncolored, neither magnified nor diminished, but in the most exact truth. So clear was the logic, and so close the connexion, that every member of his argument carried the weight of all that went before, and opened the way to all that was to follow. In this he was unrivalled; it was the secret of his success, and the crowning glory of his reputation.

I have listened to forensic discussions in Westminster Hall, and in the Supreme Court of the United States, and in many of the appellate tribunals of the sister States of the Union; and I never doubted but that Judge Cone would have sustained himself creditably, upon any legal arena, in this or any other country.

Although the law presents the means of gaining respectability and competence to all; distinction and

eminence to many ; yet, what a limited number pursue it steadily, industriously and uprightly ; how few master it. As a science, Judge Cone had a thorough knowledge of his profession in all its departments, and practiced it in the love of it. He was no idler in the vineyard from which Scarlett and Brougham, and Pinkney, and Berrien, had garnered such an abundant harvest. He delved daily and diligently at his work. His motto was, "*nulla palma sine sudore.*"

It is true of Judge Cone, as of many other eminent jurists, that his political career, is not that portion of his life, which his eulogists may dwell on with most complacency ; still, as a legislator, he has done the State some service. His revision and consolidation acts of 1855-'56, upon the law of attachments and limitations, &c., will connect his name indissolubly with the civil code of Georgia. He believed in a thorough, comprehensive reform of the law, and, as already remarked, labored to some extent, to that end. He did not desire, however, to prune the tree to the quick, but to disencumber it of its rotten leaves and dead branches and prurient shoots : and all such amendments are manifestly for the advancement of justice.

It was said of a certain legal functionary of England, no less a personage than Sir Richard Pepper Arden, (afterward as Lord Alvanley,) that he once blundered on a joke. The ordinary conversation of Judge Cone was a string of pearls, of wit and humor. He had a keen sense of the ludicrous, and Burton, the comedian, was not more effectual in provoking laughter by pointing his finger, a waggish shake of the head, or the gesticulation of the features, than Judge Cone. Foote said of Wedderburne, that he was not only himself, but the cause of dullness in others. The very reverse was true of our friend ; he excited mirth in every circle he entered. No man understood human nature better. In one of our journeyings to Quebec, in 1832,

for we associated intimately, for more than a third of a century, we frequently undertook to guess at the calling of the various persons we met, by their dress and deportment, and the Judge was seldom at fault, in determining. The deceased was the most agreeable of companions, always cheerful and yielding. He never fretted at what he could or could not help—the true philosophy of life—temperate in his diet and eschewing dessert and confectionary; he was a sound sleeper, and a stranger to that most distressing of all the afflictions that flesh is heir to—dyspepsia—and hence his best faculties were always at his command. Charles II used to say to Lord Shaftesbury, that he had more law than all his judges, and more divinity than all his Doctors. It might be going too far to affirm this of Judge Cone; but I will say that few were more familiar, either with the human or divine code. Whether he treated the Scriptures as reverently as their dignity deserved is somewhat questionable; he would jest with clergymen and others upon this, as upon all other subjects. And yet, I take it upon myself to bear testimony that he was neither a scoffer nor a skeptic. He declared to me upon his death-bed that the Christian religion was the best system that could have been devised for man—that he had contributed cheerfully to its support, and that he sincerely desired to see it pervade the whole earth. Forgiveness of enemies is one of the most attractive features of christianity. About the last sentence uttered by Judge Cone, the day I spent with him, during his last illness, was this: “I am at peace with all the world; I have no ill will to any human being, and there is not one in existence to whom I would not render a service, if in my power.” And I doubt not he spoke the truth. I never knew any one more free from envy, hatred, malice, and all uncharitableness. And for this I loved him, with all his faults. From the self-righteous Pharisee, from the slanderer and the backbiter, good Lord deliver us!

Tribute of respect to the memory of Judge Cone.

But the indulgent husband, and fond father—the humane master and the kind neighbor is gone! Never shall we meet his genial smile again. The voice of censure or of praise is the same to him in the cold and silent tomb. The plaudits of the audience will no more be heard or heeded by him than will the silent flow of that gentle tribute of tears with which devoted affection bedews his grave. It is human to err; this old truth lies at the foundation of that sublime faith which trusts in an incarnate atonement. Judge Cone had his faults, his infirmities, his weakness. Who has not? Let him that is without them cast the first stone. But he had a generous nature, great virtues. God forbid that I should flatter the living or the dead; but trusting in Him, as my dying friend assured me he did, is it forbidden me to cherish the hope, that the struggle of life ended, he has recovered his wasted strength, and refreshed his fatigued faculties in the balmy breezes of Heaven's happy home?

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 4. An administrator's letters are not abated by his removal out of the State.—*Brown, administrator, vs. Strickland*..... 387
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6. An award made under a rule of court, according to the act of 1799, takes the place of the verdict, and the judgment on it the place of the judgment on the verdict. Consequently the judgment is admissible in evidence, as to persons not parties to it, in the same way in which it would have been so admissible had it been a judgment on a verdict. Whitlock vs. Crew..... 289
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9. The refusal of the court to allow a witness to depose whether he heard the sheriff called on to arrest the defendants, for that they had killed the deceased, is not error. *Ib.*

10. Presence and participation in the act of killing a human being, is not evidence of consent and concurrence in the perpetration of the act, by a defendant charged as aiding and abetting in the killing, unless he had a felonious design or participated in the felonious design of the person killing. *Ib.*

11. If the person charged with murder in the first degree, commit the assault on the deceased with a deadly weapon, but his intention to assault him with a deadly weapon was unknown to the person charged in the same indictment as principal in the second degree and he intended to participate in an assault and battery only, and in no design to kill, he is guilty of manslaughter only. *Ib.*

12. If a person charged in an indictment as principal in the second degree is connected with the act of killing, but is not connected with the intention to kill, and does not know that the person killing intended to use a deadly weapon in making the as-

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sault, he is guilty of manslaughter; but if the court charged the jury that his being connected with the act of killing made him guilty of murder, a new trial ought to be granted if the jury convicted him of manslaughter only. *Ib.*

13. If a charge of the court be more favorable to a defendant than the evidence would warrant, it is no ground for granting a new trial. *Ib.*

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1. Notwithstanding the original bill be sworn to, yet the amendment to it need not be, unless it be necessary to continue the injunction.—Maddox vs. Rowe..... 61

EQ. PLEADING AND PRACTICE.—CONTINUED.

2. A father and son agree that the son shall convey to the father a certain lot of land, in consideration of which the father undertakes and promises to devise to the son two other lots, and also property to compensate him for services rendered. A bill to enforce this agreement is not demurable for multifariousness.—*Ib.*
3. It is the right of the complainant to amend his bill in matter of form or substance at any stage of the cause that he may see fit; and if the effect of the amendment be to destroy the bill, the defendant must take advantage of it by demurrer, or a motion to dismiss.—*Vanduzer vs. McMillan*..... 339
4. A complainant cannot waive an answer from the defendant; but to every bill, it is the privilege of the defendant to file an answer, and to use the same as testimony, or for the purpose of a cross-bill, or any other purpose sanctioned by the usages and customs of courts of equity.—*Ib.*
5. An answer that admits enough of the bill to entitle the complainant to the decree he prays for, is sufficient, whether it answers all of the bill or not. *Berry & Mehan vs. Winter*..... 602

EVIDENCE.

1. A party being convicted of a misdemeanor, a motion was made by him for a new trial, and in that motion, was incorporated a brief of the evidence as taken down by the court; which brief was agreed to by both parties and approved by the court. The motion was overruled and the same brief was incorporated in a bill of exceptions, (which bill was

EVIDENCE—CONTINUED.

- also agreed to by the parties and sanctioned by the court,) and sent up to the appellate court. That court granted a new trial, and on that trial, a copy of this brief—the copy retained by the lower court, under the law on that subject—was offered as secondary evidence of what a witness had sworn to, on the first trial, a foundation having been laid for its introduction as secondary evidence. *Held*, That the copy was admissible.—*Smith vs. The State* 19
2. A witness may testify that he wrote a letter addressed to a particular individual; but he will not be permitted to disclose the contents, unless the foundation is first laid to let in this secondary evidence.—*Holcomb vs. The State*..... 66
3. Sayings are not admissible as a part of the *res gestæ*, if it appears that they were uttered at an indefinite time, after the happening of the thing to which they relate.—*Sims vs. Macon & Western Railroad Co.*..... 93
4. If the defendant claims title under the complainant, he has the right to show that title was in the complainant, if he can.—*Flanegan vs. Garrison & Wife*..... 136
5. One of the two witnesses to a deed pertinent to the issue, was a party defendant in the case. He was offered by the defendant as a witness to prove the deed, no excuse having been given for not calling the other subscribing witness. *Held*, That he was not competent.—*Umphreys et al. vs. Hendricks* 157

EVIDENCE—CONTINUED.

6. The consideration of a note was expressed to be, "value received." *Held*, That verbal evidence, that an agreement was the consideration of the note, would not be evidence to contradict the note. Knight vs. Knight..... 165

7. The jury are to determine on the credit they will give a witness, who has been impeached on one side for want of character, but who has been supported on the other by counter proof. That the jury believed him is no ground to set aside a verdict as being against evidence.—Western & Atlantic Railroad vs. Carlton..... 180

8. A *mill-wright* may give his *opinion* as the skillfulness of work done on a mill, but not a *mill*er.—Walker vs. Fields..... 237

9. An expert may give an opinion upon the *facts* testified to by other witnesses, but not upon *their opinions*.—*Ib.*

10. It is the right of the defendant to introduce rebutting testimony, although it be cumulative only.—*Ib.*

11. In a suit against the assignee of an execution by a defendant, to recover back money paid upon it, the exemplification of a judgment and an execution against another defendant for the same debt, by which it appears that the plaintiff, from whose representatives the assignee derived title, had been paid the debt, is admissible in evidence; and so is the exemplification of the judgment and the execution against the defendant on which the money was paid.—Logan vs. Sumter. 242

EVIDENCE—CONTINUED.

12. Admissions of a party charged with larceny, when evidence.—Walker vs. The State..... 254
13. When cotton is weighed by warehouse men, and an account of the weights is rendered the storer, their books, and not his, are the best evidence as to the weights.—Cloud & Shackelford vs. Hartridge et al 272
14. A party cannot support the testimony of his own witness before he is attacked either for want of character or because he has made contradictory statements.—Hamilton vs. Conyers..... 276
15. A party's answers to interrogatories are evidence against him as *admissions*, though the interrogatories may belong to a different case.—Whitaker vs. Crew 289
16. A person who, by a release, has freed himself from all interest in the event of the suit, is competent as a witness.—Martin vs. Mitchell..... 382
17. A witness offered to impeach another witness, forms an exception to the general rule against the asking of leading questions.—Allen vs. The State. 395
18. The depositions of a witness cannot be impeached by proof of contradictory statements, which the witness had no opportunity to explain; neither can they be impeached by statements of the witness that they did not speak the truth.—Mulligan vs. Bailey..... 507
19. If a part of a letter is admissible as evidence, another part, needed to explain that part, is admissible.—Walker vs. Griggs..... 552

FRAUD.

1. An unsuccessful attempt to commit a fraud by A. on B., does not justify B. in practicing a fraud upon A.—Mulligan vs. Bailey..... 507
2. If a charge be inapplicable to the facts, it is no ground of error which will justify a new trial, even if the court mistake the law; especially where the charge is in favor of the plaintiff in error. The offence of fraud consists in the deception which is practiced; and this may be done just as effectually when speaking the truth literally, as by uttering a falsehood.—*Ib.*

FRAUDS, STATUTE OF

1. When a verbal contract, as to land, has been so largely acted on as to be almost fully performed on both sides, the effect is to take the case out of the statute of frauds.—Knight vs. Knight..... 165

FRAUDULENT ASSIGNMENTS.

A transfer, by an insolvent debtor, to one of his creditors, of his books of accounts, to collect the same, and out of the proceeds, to pay himself, and turn over the balance, if any, to the assignor, is void under the act of 1818. The cases of *Norton vs. Cobb & Crawford* (20 Ga. Rep. 44,) and *Watkins vs. Jenks & Ogden* (24 Ga. Rep. 431,) re-affirmed.—*Lamb & Mathis et al. vs. Radcliff*..... 520

GAMING.

The acts of 174 (Cobb, 725,) and 1765 (Cobb, 727,) against gaming, constitutional and valid; and of force in this State.—*Neal vs. Todd & Killebreed*... 334

GARNISHMENT.

1. An administrator is not subject to garnishment within twelve months after his appointment.—
Selman vs. Milliken..... 366

HUSBAND AND WIFE.

A husband is called upon to testify on an issue of *devisavit vel non*, where his wife takes an interest under the will if established by law, upon which his marital rights would attach; he by deed conveys the whole interest in trust for the sole and separate use of his wife and children; subsequently the wife relinquishes to her children. *Held*, That the wife had the right to execute the conveyance, and that the husband was thereby qualified to swear as a witness in the case. And further, that the wife being no party to the case, and her interest being determined, it did not violate the rule which forbids husbands and wives from testifying against each other.—Meredith and wife v. Hughes. 571

ILLEGALITY.

1. An affidavit of illegality, on the ground of payment, was put into a *fi. fa.* and overruled. Afterwards a motion was made to have the *fi. fa.* entered satisfied as paid. *Held*, That the judgment overruling the affidavit was a bar to this motion. Tucker v. Respass..... 613
2. Whether the sheriff should or should not receive an affidavit of illegality, is a question he must determine for himself; and if he determines it wrong, he will be liable to the injured party.—*Ib.*
3. Attached to a *fi. fa.* was a paper which purported to be a copy of a judgment overruling an affidavit

ILLEGALITY—CONTINUED.

of illegality, the copy being signed and certified by the clerk, but not sealed. *Held*, That the paper was sufficient notice to the sheriff, that one affidavit of illegality had once been received and that he ought not to receive another, if, indeed, any notice was necessary.—*Ib.*

INFANTS.

1. An action for or against an infant should be prosecuted or defended in their own name, and they should in all cases appear by guardian.—*Oliver v. McDuffie*..... 522
2. If an infant be liable on a contract for necessities, he is suable at law, and there is no need of resorting to equity.—*Ib.*
3. Whether an account for necessities be contracted before or after the appointment of a guardian, can make no difference as to the forum where suit is to brought.—*Ib.*

See WILLS, 5. PARENT AND CHILD, 1-2.

INFERIOR COURT.

1. When the inferior court are required by statute to adjudge the expenses incurred by the escheator, in securing escheated property, they are not bound to direct an issue of fact to ascertain such expenses. *Gresham v. Rickenbacker*..... 227
2. If the inferior court be required to determine such expenses, their judgment or award is final and conclusive on the parties.—*Ib.*

 INFERIOR COURT—CONTINUED.

3. If counsel have been employed by the escheator, a reasonable allowance should be made them by the court.—*Ib.*

INJUNCTIONS.

1. An unsound negro was sold by an administrator, but without warranty of soundness, and without deceit. The purchaser applied for an injunction to prevent the collection of his note given for the purchase money. *Held*, that he was not entitled to the injunction.—*Johnson v. Andrews*..... 17
2. When injunction, to prevent the erection of contemplated or anticipated nuisance, will not be granted.—*Mygatt v. Goetchius*, 20 Geo. Rep. 350, re-affirmed.
Cunningham v. Rice..... 30
3. A party is not entitled to an injunction who shows that he has been negligent and careless in guarding his rights, and that if he has been subjected to loss it was because he had not attended to his interests in proper time.—*Dulin v. Caldwell & Co.*..... 117
4. An injunction will always be dissolved when all the equity in the bill is fully denied by the answers; and when the reasons for dissolving the injunction, so far as the rights and equities of the parties are concerned, are much stronger than for retaining it.
Weaver v. Garnett, et. al...... 503
5. Where there is no equity in the bill, the injunction it prays for ought to be refused.—*Smith & Lennard v. Lard, et. al.*..... 585

INSOLVENT DEBTORS.

1. Judgment against a defendant and his security on *ca sa.* bond, after the defendant has been discharged under the Honest debtor's Act, to which proceedings the plaintiffs were parties, the judgment taken without his consent, ought to be set aside. *Johnson, Smith & Co. v. Thurmond & Terry*..... 127
- 2- A *ca. sa.* bond payable to the sheriff instead of the plaintiff, is good; and the court will compel the officer to assign the same.—*Tucker v. Davidson*.... 535
3. A *ca. sa.* bond is intended only to secure the appearance of the debtor. If he surrenders himself at court, or is delivered up by the sureties, the bond is discharged.—*Id.*
4. A *ca. sa.* bond, with a condition, "that the debtor appear and abide by and perform the judgment of the court in the premises," is a valid bond.—*Id.*

INTEREST.

1. The drawer of a lot of land conveyed it with warranty, and the purchaser took possession. The drawer failed to take out his grant, and the lot was granted to another person, under the forfeiting act, and he evicted the purchaser from the drawer, and that purchaser sued the drawer on his warranty. *Held*, That he was not entitled to recover interest on the purchase money, for the period between his purchase and the issuing of the grant, as he had enjoyed the rents of the land during that period. *Whitaker v. Crew*..... 289

INTERROGATORIES.

An attorney not feed in *the case* may be employed to execute a commission to take the deposition of witnesses; and if the witness examined in reply to a question, "who are present at the execution of these interrogatories, and who of them is feed counsel or agent for plaintiff in taking them?" says that "no one is present but the commissioners and myself," the answer is full and sufficient for the objects contemplated by the party asking the question.—*Clopton v. Norris*..... 188

JOINT TENANTS AND TENANTS IN COMMON.

One or more of several joint-tenants, or tenants in common, may sue separately in trover.—*Howard et. al. v. Snelling et. al.*..... 469

LAMAR, JOHN, ESQ., OBITUARY.

Notice of..... 620

LANDLORD AND TENANT.

1. The act of 1827, to amend the rent laws of this State, requires the tenant before he can arrest the proceeding thereon given to the landlord, to swear that his lease is not expired, and that he does not hold the premises either by lease or rent from the affiant who is seeking to dispossess him. *Held*, That where there is a *blank* in the affidavit where the name of the movant should appear, the omission is fatal, and is not amendable.—*Lockett v. Usry*..... 845

LANLORD AND TENANT—CONTINUED.

2. Notwithstanding the lease expired at the end of the year 1853, still, if the tenant seeks to arrest the process after the act of 1854 went into operation, his affidavit must conform to that act; the movant having amended his proceeding so as to bring himself within its provisions.—*Ib.*
3. A verdict rendered in a cause, where there is no issue under the rent acts of 1827 and 1854, is a nullity, and may be treated as such.—*Ib.*
4. Although the judgment of the court purports to be founded upon a verdict, and the verdict is void, still the judgment can be executed, provided it be good without the verdict.—*Ib.*
5. A tenant who holds over, may file his affidavit at any time before he is dispossessed, and arrest the proceeding.—*Ib.*

• LEGACIES, CHARGEABLE ON LAND.

1. A pecuniary legacy to infant wards, payable when they become twenty-one, was charged on lands. The devisees of the lands paid the legacies to the guardian, before the wards became twenty-one. Afterwards, the devisees sold the lands. *Held*, That the lands, in the hands of the purchaser remained charged with the legacies.—*Cato v. Gen-try*..... 328

LIMITATION OF ESTATES.

1. A limitation of an estate by a testator to his wife, during her natural life or widowhood, is good. *Doyal and wife vs. Smith, Ex'r*..... 263

LIMITATION OF ESTATES—CONTINUED.

2. "I give to my daughter, Lucinda Mildred Brown, the following property, to-wit: Jack, &c. All the above property I give to my daughter Lucinda Mildred Brown, for her own separate support and for the support of her and her family; and the property nor its increase to be made subject to the debts of no person she may marry, it nor its proceeds, but to go wholly to her support, her and her children and family. The above property I give to my daughter Lucinda M. Brown, for her own benefit and separate support, it and its increase, for her and her children and family, and at her death it and its increase to go to her children and be equally divided between them, and the above property, it nor its increase nor its proceeds, is not to be made subject to the debts of no person that she may marry; and if she should die and leave children, and they should not be raised, and they should die, then and in that case, it is my will that all the above property that I have given my daughter be put together and the man she should marry have one-third of it and its increase, and the other two-thirds be equally divided between all my grandchildren, &c." *Held*, That Lucinda Mildred Brown, (Mrs. Jossey,) took an estate for life only in the property bequeathed to her by Reuben Brown, her father.—*Jossey and wife vs. White et al.*..... 265

3. A nuncupative will was in these words: "He settles by will, James, Sukey, and Emily, on Mrs. Mary Ann Caraway, and the natural heirs of her body, after her death." *Held*, That the negroes vested absolutely, in Mrs. Caraway.—*Caraway vs. Smith*..... 541

LIMITATIONS, STATUTE OF.

1. Notwithstanding fraud and concealment is a good reply to the plea of the statute of limitations, still, where the demand is thirty years old, and the creditor has been grossly negligent in not ferreting out the fraud, equity will not lend its aid in such a case.—Edmonds' Ex'rs vs. Goodwyn..... 39
2. If, in a suit on a promisory note, the statute of limitations is pleaded, and a new promise is proven, the statutory *bar*, which applies to the original demand, is that which applies to the new promise.
Dawson & Dawson, Adm'rs vs. Godkins..... 311

LOST PAPERS.

Under the act of 1856, notice of a proceeding to establish a lost or destroyed paper, must be served *personally* on the party, if to be found within the State; and if not, published in some public gazette within the State for three months; and if a party residing out of the county be served by leaving a copy at his residence, the proceeding is void. If the proceeding be against the drawer of a draft, the acceptors should be made parties.—Bond vs. Whitfield, Adm'r..... 587

MALICIOUS MISCHIEF.

To constitute the offence of malicious mischief under our Code, it is not necessary to prove actual ill-will or resentment towards the owner or possessor of the property. If the act be done, wantonly and recklessly, or under circumstances which bespeak a mind prompt and disposed to the commission of mischief, it is sufficient.—Mosely vs. The State... 190

MARKETS.

- A grant to *establish* and *keep up* a market, does not of itself imply the power to exclude all persons from selling elsewhere marketable articles within market hours.—Bethune vs. Hughes..... 560

MARRIAGE SETTLEMENTS.

- The expression, "*bona fide* creditor," in the act of 1847, for recording marriage settlements, means a creditor who gives credit on the faith of the property contained in the marriage settlement.—Cloud & Shackelford vs. Dupree..... 170

MISTAKE.

- If, on a note given in part of the consideration agreed to be paid for lands, the payee enter that the principal of the note is reduced one thousand dollars in consequence of the correction of an error in the bond for titles, such entry does not *bind* the party making it; it depends on whether the error was in the contract, and in the process used in arriving at the aggregate price of all the lands, to give effect to which the bond for titles was given.—Hamilton vs. Conyers..... 276

MUNICIPAL CORPORATIONS, POWERS OF.

1. Under a power conferred by the Legislature upon municipal corporations, to make all contracts in their corporate capacity, which they may deem necessary for the welfare of the city, and which do not conflict with the laws of the Federal and State governments, they have a right to make a contract for the construction of water-works.—Mayor and Council of Rome vs. Cabot..... 50

MUNICIPAL CORPORATIONS, POWERS
OF—CONTINUED.

2. A grant to *establish and keep up* a market, does not of itself imply the power to exclude all persons from selling elsewhere Marketable articles within market hours.—Bethune vs. Hughes..... 560

NE EXEAT BOND.

- Security upon a *ne exeat* bond when sued thereon cannot object to the sufficiency of the affidavit upon which the bill was sanctioned.—Blue, Adm'r et al. vs. Sheppard et al..... 566

NEW TRIAL.

1. When the verdict is equitable and there is evidence to support it, it will not be set aside, for an error in the charge, unless there is a motion for a new trial with that error as a ground for the motion. Whitlock vs. Gains..... 25
2. When the case is not only fairly but favorably submitted to the jury, and there is sufficient proof to sustain the verdict, the court will reluctantly interpose, especially where there is reason to believe that the jury understand the character of the witnesses, and of the accused, better than the court. Holcomb vs. The State..... 66
3. Newly discovered evidence, if merely cumulative, is not a sufficient ground for a new trial.—Coleman vs. The State..... 78
4. The defendant, in an attachment, took issue on the attachment-affidavit; and, thereupon, moved for leave to open and conclude the case on the trial

NEW TRIAL—CONTINUED.

- of the issue. The court overruled the motion, and there was a verdict for the plaintiff. The record did not show whether any evidence was introduced by the plaintiff, or indeed by either party. *Held*, That the case made by the record, was not sufficient to entitle the defendant to a new trial.—*Bethea vs. Prothro*..... 108
5. If one of the grounds on which a new trial is moved, is that the verdict of the jury is contrary to the charge of the court, and the charge is not sent up, that ground will not be considered.—*Grice vs. Graham*..... 186
6. The verdict of the jury not being contrary to the weight of evidence, a new trial will not be granted. *Ib.*
7. When proof of a credit to which the losing party is entitled, has been rejected by the court, a new trial will be awarded, unless the judgment is abated by the amount of said credit.—*Harper vs. Parker*, 257
8. When the point at issue between the parties, is whether a certain transaction was an absolute or conditional sale, and the court charges in both aspects of the case, and there is evidence to justify the charge, the verdict will not be disturbed.—*Ib.*
9. The verdict of a jury on an issue, on a plea in abatement to the jurisdiction of the court, sustaining the jurisdiction, when there was evidence on both sides, will not be disturbed.—*Hendry vs. Smith*..... 408

NEW TRIAL—CONTINUED.

10. Notwithstanding the court may differ with the jury as to the preponderance of the proof, yet the verdict will not be disturbed upon a naked question of fact, provided there be sufficient evidence to support the finding; especially when the circuit judge is satisfied and refuses to grant a new trial.—*Diomatari vs. Choate et al.*..... 320

11. On the trial of a caveat, the court having put to the jurors the question, whether they had formed and expressed an opinion as to which party ought to prevail, was requested by the caveator to ask those of them who answered this question, yes, the further question, what was the foundation of their opinion; and the court refused to put this further question. *Held*, That such refusal was not a sufficient ground for a new trial.—*Martin vs. Mitchell*, 382

12. A juror, during the progress of a trial, slept one night in the same room with one of the counsel for the prevailing party, but it was a room in a tavern, and the only separate lodging place left; he paid his own expense; slept in the same bed with the sheriff; there was no conversation about the case; and there was evidence quite sufficient to support the verdict. *Held*, That this was not a sufficient cause for setting aside the verdict.—*Ib.*

13. A new trial ought to be granted where one of the jury is cousin to the prosecutor, and the fact not known to the accused or his counsel till after his conviction.—*Brown vs. The State*..... 439

14. If there be a conflict of testimony, and the circuit judge refuses to grant a new trial, this court will

NEW TRIAL—CONTINUED.

- not interfere, although, in their opinion, the weight of testimony is against the verdict.—Doe ex dem. Hanby vs. Tucker..... 484
15. When the verdict is contrary to the evidence, a judgment ordering a new trial ought not to be disturbed.—Clements & Miller vs. Little..... 491
16. In a claim case, the defendant in *fi. fa.* was examined as a witness, by the plaintiff, without objection by the claimant. *Held*, That such examination was not a ground for a new trial.—Caraway vs. Smith..... 541
17. When the verdict of the jury is strongly and decidedly against the weight of evidence, not only as to the amount of damages found, but the right of the plaintiff to recover at all, and the circuit judge grants a new trial, this court will not interfere. Cook vs. Jones..... 589

NUISANCE.

1. The erection of a bridge across a navigable stream, so low as to obstruct the passage of boats, is a public nuisance.—South Carolina Railroad Company v. Moore & Philpot 398
2. A public nuisance is the subject of *indictment*, not of *action*.—*Ib.*
3. If, by a public nuisance, a party suffer particular damage, an action lies.—*Ib.*
4. For any obstruction to the public highway, or a stream, which is a public nuisance, though such obstructs the plaintiff's business, an action on the

 NUISANCE—CONTINUED.

case cannot be maintained by the party so obstructed, unless under special circumstances; the only remedy being by indictment.—*Ib.*

PARENT AND CHILD.

1. A father is bound to pay a debt contracted by his minor child, if he authorized the child to contract it; and a promise by the father to pay the debt, in certain events, is a fact admissible to the jury on the question, whether the father did, or did not, authorize the son to contract the debt.—*Brown & McCoy v. Deloach*..... 486
2. A firm of merchants furnished a minor with goods, consisting of a plated chain, two gold pens and pencil cases, a cassimere suit of clothes, two pairs of kid gloves, and other similar articles, and proved by a witness that "the goods were necessities and suitable to the condition" of the minor. There was no proof that the minor had not, already a supply of such goods. The father of the minor was sued for the price of the goods. *Held*, That even if a father is bound to pay for necessities furnished to his child, and, even if these goods are such as can be included in the term necessities, yet, that the father is not liable to pay for them, unless it be shown that the child, when furnished with them, was destitute of such goods.—*Ib.*

PAROL TESTIMONY.

Evidence of fraud or mistake, in making the estimate of the price to be paid for a settlement of land, in a suit on a note given for the land is admissible, although notes and a bond for titles expressive of the contract were signed by the parties, and such

 PAROL TESTIMONY—CONTINUED.

evidence does not vary or contradict the written testimony.—*Hamilton v. Conyers*..... 276

PARTNERSHIPS.

1. A partnership is presumed to be solvent until the contrary appears.—*Wallace & Wingfield v. Hull, Frierson & Co*..... 68
2. The apparent interest of each partner is to be considered and treated as his actual interest, until rebutted by proof.—*Ib.*
3. The right of partners can be ascertained and settled at law as well as in equity.—*Ib.*
4. A creditor of two members of a firm is entitled, by garnishment, against any one having effects of the firm in his hands, or who is a debtor to such partnership, to subject the interest of said two members in said effects or debt to the payment of his demand.—*Ib.*
5. The firm of A & B sue C on a partnership debt—it is not allowable for C to settle the claim by crediting it with the amount due him by one of said firm, without the knowledge and consent of the other partner.—*Harlow v. Roper, Scurry & Co*..... 219
6. The assets of a partnership were not sufficient to pay the debts against the partnership; the separate assets of one of the partners, a deceased person, were not sufficient to pay his separate debts. *Held*, That the partnership debts had the right to be first paid out of the partnership assets, and the separate debts the right to be first paid out of the separate assets.—*Tombs v. Hill*..... 371

PLEADING AND PRACTICE.

1. Where a suit is pending against a *female*, and she intermarries, the suit does not abate, neither can the husband be made a party by *scire facias*, but the case proceeds to judgment and execution without noticing the husband.—*Evans v. Lipscomb et al*..... 71

2. A trustee brought trover. Afterwards he moved that he might be removed from the action, and another person be put in his place; and, in support of the motion, he showed that, by regular order of court he had been removed from the trusteeship, and that person appointed to his place. *Held*, that the motion ought to have been granted.—*Lindsey v. Lindsey*..... 169

3. When an act is directed to be done at a particular term of the court, the session of which is prevented by providential cause, the act may be done at the next ensuing term.—*Weatherford v. Shegag et al*, 194

4. Where bail process is sued out, under the act of 1857, it is not necessary that the sum sworn to should be endorsed upon the declaration when filed.—*Id.*

5. If, in a suit on a foreign judgment it appears that of eight defendants, the officer served five, but he does not designate the five by name, and it appears that the parties, plaintiffs and defendants appeared by counsel, and the jury in their verdict mention each of the eight defendants by name, and say they find against the defendants, and it appears that an appeal was entered, and that on a motion to dismiss the appeal, all the defendants mentioned by

PLEADING AND PRACTICE—CONTINUED.

- name were appellants, it is sufficient *prima facie* evidence against two of the eight defendants sued here, that they appeared and defended—it is not conclusive on them, however, they may prove the contrary.—*Shands & Co. v. Howell & Co.*..... 222
6. A plea, which, in effect, is a plea of partial failure of consideration, that in ascertaining the price of lands sold, which was to be arrived at by estimating the number of acres in all the lands, there was a fraud or mistake in setting down the number of lots of land by which one lot was added improperly is a good plea.—*Hamilton v. Conyers*..... 276
7. A plea, filed as a plea of *non est factum*, and of no value except as such plea, need not be stricken out, if the affidavit of its truth be expunged. It cannot benefit the defendant nor harm the plaintiff.—*Ib.*
8. If the declaration is amenable, so as to make it fit the evidence, the evidence should be received. *Whitlock v. Crews*..... 289
9. A plaintiff amended his declaration by substituting another person for himself. This amendment was struck out, on the objection of the defendant. *Held*, that the effect was to restore the case to its first condition, and therefore was to make him become the plaintiff again.—*Bealle v. Day*..... 435
10. An argument drawn from matter not contained in the record, must be disregarded.—*Ib.*
11. To a *scire facias* to make a party plaintiff, the defendant pleaded a retraxit by the previous plain-

PLEADING AND PRACTICE—CONTINUED.

- tiff, and a "settlement" with the previous plaintiff. The court declined to divide these pleas, but saved them for a defence to the defendant on the trial of the action. *Held*, that this action ought not to be disturbed.—*Ib.*
- 12. The amendatory act of 1853-'54 did not intend to subvert the order of pleading, so as to admit a dilatory plea to be filed, after the case had been tried upon its merits and was pending on the appeal.—*Berry et. al. v. Cooper & Boykin, Exors.* 543

POOR SCHOOL FUNDS.

- All the accounts of poor school teachers are to be paid *pro rata*, by the act of 1857 on the subject. *King v. Barber*..... 298

POSSESSION, ADVERSE.

- Cutting fire wood and rail timber on land are not such acts of ownership as to constitute adverse possession.—*Long v. Young.* 180

POSSESSION, CONSTRUCTIVE.

- 1. A residence upon, and the actual possession and occupation of one of two tracts of land conveyed to the defendant in the same deed, is not such a constructive possession of the other tract of which there is no actual occupation, as if continued long enough, will bar an action by the rightful owner under the statute of limitations.—*Grimes v. Ragland*..... 128

POWERS OF ATTORNEY.

1. That a power may be a power coupled with an interest, the agent must have an interest in that to which the power relates; it is not enough that he pays a valuable consideration for the power.—Con-ey, Adm'r. v. Sanders et. al..... 511
2. The fifth section of the act of 1785, which section declares, that sales of lands, made under powers, shall be good if made before the agent has "notice of a countermand. revocation, or death of the the constituent," applies only to powers made out of the State.....*Id.*

PRACTICE, IN SUPREME COURT.

1. When two judges only of the supreme court pre- side in a cause, (the third being absent from prov- idential cause,) and they cannot agree upon a judg- ment after the same has been heard and consid- ered, and the writ of error is stricken from the docket, and these facts are certified in the remit- titur by the clerk of this court to the court below, it is not error in the circuit judge to order a judg- ment of affirmance, to be entered upon his min- utes.—*Styles v. The State...* 388
2. Glisson applied for letters of administration on the estate of Wm. H. Carter. Joseph H. Carter resis- ted the application; the ordinary decided in favor of Glisson; Carter appealed, and pending the suit, died. The second term after his death—nothing having been done in the case in the meantime— Glisson moved for certain orders in the case, which motion was refused. To that refusal Glisson excepted, and made it the ground of a writ of error. *Held*, That the writ of error ought to be dismissed. *Glisson v. Carter*..... 516

 PRINCIPAL AND AGENT.

1. Where cotton is shipped through an agent for that purpose, he is authorized to bind his principal according to law. In the absence of proof to the contrary, the general law of common carriers is the power under which the agent acts. If a usage be sufficiently established, that will govern, because it is presumed to be known to the parties. And this presumption is conclusive upon the principal, whether it is known to the agent or not. But a custom known only to the agent, and which is not so established as to make it the law of the contract otherwise, will not bind the principal. The knowledge of the agent is not the knowledge of the principal in this case. In other words, if he acts upon his private knowledge, he exceeds his authority, and does not bind his principal.—*Berry et al. vs. Cooper and Boykin, ex'ors.*..... 548

RAILROADS, LIABILITY OF.

1. A railroad company is not liable for a loss occasioned by a collision of its trains, if its agents used ordinary care to prevent the collision, and if the party suffering the loss was guilty of gross negligence.—*Sims vs. Macon & West. Railroad Co.*..... 98
2. Parol evidence is admissible to show it a rule of the Western & Atlantic Railroad, that persons are not to be on the platform when the cars are in motion.—*Yonge vs. Kinney*..... 111
3. A railroad car running off the track, is *prima-facie* evidence of negligence in some of the persons connected with the road.—*Ib.*

RAILROADS, LIABILITY OF—CONTINUED.

4. If the person who is injured by the cars running off the track is himself culpable, the damages, if any, should not be as large as if he had been free from fault.—*Ib.*
5. The plaintiff, in a suit against the superintendent of the road, is not restricted to the amount claimed when he presented his account to that officer for settlement. As in other cases, he recovers according to his proofs under the law.—*Western & Atlantic Railroad vs. Carlton*..... 180
6. The proof was, that a man's cattle were killed by a railroad train, and that the agent of the railroad company, when applied to for pay for the cattle, offered to pay for them, which offer, however, was, from being deemed inadequate, rejected. *Held*, That this proof was sufficient to cast on the company the *onus* of proving that the killing of the cattle was not the result of negligence.—*Georgia Railroad & Banking Co. vs. Willis*..... 317

REFORMING AND CANCELLING INSTRUMENTS.

1. If an instrument, by mistake of its author or draftsman, fails to speak his mind, a court of equity will modify the instrument, so as to make it speak his mind.—*Ward et al. vs. Allen*.. 74
2. A deed, though void, may be a cloud over the true title; and, therefore, a bill will lie, to have it delivered up to be cancelled.—*Brewton vs. Smith and Wife*.... 442
3. K. made a deed in which he said, "I give and bequeath the aforesaid slaves to the said Ebaline

REFORMING AND CANCELLING INSTRUMENTS.

CONTINUED.

Sikes and any other child or children which I may hereafter have." K. had children born afterwards. These filed a bill, and prayed that the deed might be so reformed as to make it convey their interest to a *trustee* for them,—alleging, in the bill, that such trustee was left out of the deed, by ignorance of law in the donor or his scrivener. *Held*, That the bill lay.—*Ib.*

RENT.

1. J. D. leased to C. E. a lot in the city of Savannah, for the term of three years, at an annual rent of \$800, "*upon condition that the said J. D. should, on or before the first day of October next, have the main dwelling house and all the out-houses, (including servants' rooms,) on said lot, put in complete tenantable order and condition, and will, on or before the last mentioned day, have the garden lot, in front of said main dwelling house, properly laid out and enclosed with iron railing, it being understood and agreed that the payment of rent is not to commence until all the said work is finished, and it being optional with said C. E. to abandon and give up said lease, if the said work shall not be completed within three months after the said first day of October next.*"

It was further agreed between the parties, that "should the said C. E. be evicted from the premises during the lease, without fault on his part, that the *rent* should cease and determine; and further, that the payment of rent should also cease whenever the premises should become untenable from fire or any other casualty, without the fault of the

RENT—CONTINUED.

- said C. E. *Held*, That under this contract no rent accrued until the work was completed.—Epping vs. Devanny..... 422
2. A tenant cannot so withdraw his claim, under the rent act of 1827, (Cobb, 701,) as to relieve himself from the penalty of being assessed for double rent, in case the issue is found against him.—Parker vs. Beeman..... 475
3. An appeal lies under the rent law of 1827.—*Ib.*

RULES OF SURVEY.

- A rule of survey taken out pending an action of ejectment, should be limited to the purpose for which it was intended, namely, to ascertain the *locus* or the true boundaries of the premises in dispute; and it is an excess of power to delegate to the surveyor the authority to *make corners*, and to run and *mark* boundary lines. This is to lay off and admeasure lands and not to re-survey them.—Strippling vs. Davis..... 465

SCIRE FACIAS.

See PLEADING AND PRACTICE, 11.

SHERIFF, RULES AGAINST, AND DISTRIBUTION OF MONEY.

1. A sells B a tract of land at full valuation incumbered with a judgment lien, to satisfy which, the land is sold by the sheriff, leaving a surplus, after satisfying the principal interest and cost of the *fi. fa.* Upon a rule against the sheriff, and at

SHERIFF, RULES AGAINST, &c.—CONTINUED.

the instance of A, *held* that B, the purchaser, and not A, was entitled to this balance.—Fulcher vs. Felker..... 252

SHERIFFS' RETURNS.

1. The return of service on the writ, by the sheriff, cannot be traversed, except for fraud or collusion. Tillman vs. Davis 494
- See, also, Brown & Carmichael vs. Way & Taylor.... 531

SHERIFF SALES.

The effect of the sheriff's failure to advertise his sale, at three or more of the most public places in the county, is not to render the sale void, but the sheriff liable for any loss that may, by reason of such failure, happen to any one interested.—Johnson vs. Reese.. 353

STATE ROAD.

1. When the State engaged in the carrying business on the W. & A. Railroad, it assumed the obligations and liabilities incident to that business when carried on by individuals, and subject to the remedies by suit against the superintendent of the road, when the claim cannot be otherwise adjusted.—Western & Atlantic Railroad vs. Carlton..... 180

SUPREME COURT DECISIONS.

Act of 1858, relating to their uniformity and reversal, is prospective only in its operation.—Bond et al. vs. Munroe..... 597

TAX ACT OF 1804.

A part of the 8th section of the tax act of 1804, says, that, "if any person" "shall be convicted of" "making a false return" of his "taxable property," "he" "shall be liable to pay the clerk of the inferior court of the county, a fine of ten dollars for every hundred dollars valuation so neglected or concealed." *Held*, That this part has been repealed, and still stands repealed.—Gorman vs. Hammond..... 85

TROVER.

1. If the *cestui que trusts* are entitled to the *possession* of property under a trust deed, they may maintain trover against a stranger, to recover the property, and such recovery would be a protection to the defendants, against a suit brought by the trustee. Howard et al. vs. Snelling et al..... 469
2. If two are sued in trover, and no conversion is proven against one of them, it is no ground for a non-suit, but the verdict should be framed in accordance with the testimony.—*Id.*
3. Plaintiff in trover recovered. Pending the action the property was sold under *fi. fas.* in favor of creditors of the defendant in trover. *Held*, That the sale was without authority and void; and, therefore, that neither those creditors nor the plaintiff in trover was entitled to the money raised from the sale. McLin vs. Williams..... 482
4. Possession of personal property cannot be recovered in an action of trover, through a fraudulent title.—Mulligan vs. Bailey..... 507

TRUSTS AND TRUST ESTATES.

The act of 1856, authorizing claims against *trust estates* to be recovered at law, provides for demands only for services rendered the trust estates, or for articles or property or money furnished for the use of *said estate*, and for the payment of which a court of equity would render said estate liable; and the judgment in such cases, has a lien on the *corpus* of the trust property; and is to be enforced by seizure and sale under the execution issuing thereon, as other common law judgments.—Satterwhite vs. Beall, Stewart & Ansley..... 525

USAGE.

1. By way of establishing a usage in shipping on a certain river, it is competent for a witness to testify as to what has been his habit and custom in shipping on all the boats of said river, as well as on the particular boat upon which the loss occurred which is the subject-matter of controversy.—Berry et al. vs. Cooper & Boykin, Ex'rs..... 543
2. To make a usage good, it must be known, certain, uniform, reasonable, and not contrary to law; and if boats on a particular river, or a particular boat on that river, sometimes gave bills of lading containing an exemption from loss by fire, and at other times, bills of lading containing no such exemption, then no such usage is established, for want of uniformity. And even if in a majority of cases, bills of lading contain such clauses of exemption, still the usage is not sufficiently proven as to make it the law of the contract between the parties.—*Ib.*
See COMMON CARRIERS, and PRINCIPAL and AGENT.

USURY.

- A mortgage creditor receives from his debtor different sums from time to time to forbear foreclosing his mortgage. *Held*, That such contracts are forbidden by the spirit and policy of our laws against usury. *Patterson vs. Clark*..... 527

WILLS, PROOF OF.

1. Where the testatrix is aged and infirm in body and mind, and her will is impeached on account of the fraud of her son and principal legatee in its procurement, he ought to produce clear and satisfactory proof of the *bona fides* of his conduct in the matter.—*Simpler vs. Lord*..... 52

WILLS.

1. Two sisters, Jincey and Patsey, executed an instrument, which was, in substance, as follows:
 “Know all men, that we, Jincey and Patsey, do ‘covenant and agree,’ that, for the love we bear to each other, whichever of us may be the longest lived, shall be the heir of the other.”
Held, That the instrument was a will.—*Evans vs. Smith*..... 98
2. Parol testimony cannot be received to add to or vary a will; but it is admissible to explain an equivocal clause.—*Doyal and Wife vs. Smith, Ex’r*..... 263
3. George Bragg made an instrument, in the form of a deed, which witnessed as follows: “That the said George Bragg, after his burial expenses and the payment of all just debts, in consideration of the love and affection which he has and bears to his said sons-in-law, J. T. Hall, and J. Jones, and son,

WILLS—CONTINUED.

- T. Z. Bragg, hath given, granted and conveyed, and does, by these presents, give, grant and convey, unto 'them' all the property that he, the said Bragg, owns and is possessed of." *Held*, That the instrument was a will, and not a deed.—Hall vs. Bragg..... 330
4. The decision pronounced in the case of Burch, Ex'r, vs. Burch, et al., 23d Geo. Rep., 536, reviewed and reaffirmed, viz: that under the terms and provisions of the will of W. C. B., (*vide* Reporter's statement below,) only the children of Elizabeth Upshaw, living, *at the death of the tenant for life*, were entitled to the legacy bequeathed to the "*children of Elizabeth Upshaw*."—Heard vs. Brawner..... 357
5. A testator set apart 80 shares of railroad stock, "for the purpose of educating" his three minor children, who were very young; and he directed, that they should "be boarded and educated out of the same," until they received a thorough classical education. *Held*, That the cost of the children's *clothes*, during the period of their education, was a charge on the stock.—Hardey vs. Park..... 366
6. A will should be so construed, if possible, as to give effect to every part; and hence, words which make a plain inequality between sons on the one hand and daughters on the other, will not be overruled by other words, unless the latter words are incompatible with the first.—Brown et al. Ex'rs, vs. Weaver et al..... 377
7. A bequest to daughters and their children, the daughters having no children in life at the time of

WILLS—CONTINUED.

the bequest, and if they shall die without issue then over—would create an estate tail in real-estate, and hence under our law creates an estate absolute passing to the husbands on marriage; and such husbands having received such estate consisting in part of proceeds of a sale of land, and having for many years acquiesced in such sale, cannot afterwards set it aside on the ground that the executor was a purchaser at his own sale, the sale having been a fair one at the time.—*Ib.*

8. It is sufficient that the will of a person nearly blind, is read to him; it is not necessary that the reading should be in the presence of the witnesses.—*Martin vs. Mitchell.* 382
9. That a jury may not think the provisions of a will, morally right, is not sufficient to authorize them to set the will aside.—*Ib.*
10. If the testator makes a deed to the property which he has bequeathed by his will, the act amounts to a revocation of the will, and it may be pleaded in bar to the probate of the will.—*Epps vs. Dean.*... 533



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